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v.8

**DECISIONS OF THE
APPEAL SECTION
WAR DEPARTMENT
CLAIMS BOARD**

SUCCESSOR TO THE BOARD OF CONTRACT ADJUSTMENT



VOLUME VIII
1921



WASHINGTON
GOVERNMENT PRINTING OFFICE
1921

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The Board of Contract Adjustment and its successor, the Appeal Section, War Department Claims Board, has now completed its work, having considered during the period November 6, 1918, to June 30, 1921, 3,071 cases. This volume will therefore be the last publication issued by the Board.

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NOVEMBER 1, 1920.

Case No. 575.

In re CLAIM OF A. C. LAWRENCE LEATHER CO.

ON APPEAL BEFORE THE SECRETARY OF WAR.

(See Vol. V, these decisions, p. 139.)

Upon consideration of the record in this matter, the decision of the Board of Contract Adjustment is hereby affirmed in accordance with the accompanying recommendation.

NEWTON D. BAKER,
Secretary of War.

SEPTEMBER 9, 1920.

Case No. 575.

***In re* CLAIM OF THE A. C. LAWRENCE LEATHER COMPANY.**

MEMORANDUM FOR THE SECRETARY OF WAR.

ON APPEAL BEFORE THE SECRETARY OF WAR.

I find myself unable to concur in the conclusions of Judge Lacombe with regard to this claim. The circular quoted above expressly limits the promise of the Government to "*bark leather*" which the Hide and Leather Control Board shall instruct claimant to make, and this promise does not purport to be made by the Hide and Leather Control Board as a matter within its authority to promise, but is stated to be based on assurances received from the *Procurement Division* as to the protection of manufacturers of bark leather. Subsequent statement contained in the circular, to the effect that the board gives this assurance because *it* (not the Procurement Division) realizes that *it* does "not want a tanner to make up any leather at the instigation of the Government and then have same left on his hands," does not seem to me sufficient to justify the conclusion that other leathers not bark leather subsequently manufactured at the request or suggestion of the Hide and Leather Control Board should be considered as covered by the same guaranty that was expressly given by the Procurement Division as to *bark leather*. Special reasons may have existed for the assurances given with regard to bark leather. Its conversion into a commercial article may have been considered to be more difficult or attended by greater risk of loss. It may have been necessary to guarantee manufacturers against loss in order to induce them to produce bark leather, and unnecessary to give such guaranty in order to secure an adequate supply of chrome retanned flesh-finished upper leather. At any rate, claimant was informed that the Procurement Division had stated that the bark leather which the Hide and Leather Control Board instructed manufacturers to make would be taken by the Government and had not been given any such assurances as to leather here in question.

I recommend that the decision of the Board be affirmed.

R. C. GOODALE,
Special Adviser.

NOVEMBER 2, 1920.

Case No. 2858.

***In re* CLAIM OF THE BALTIMORE & OHIO RAILROAD CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

(See Vol. VII, these decisions, p. 344.)

Upon consideration of the appeal and the record in this case, I am convinced that there was no implied contract, such as is alleged by the claimant, and the decision of the Appeal Section, War Department Claims Board is, therefore, affirmed.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 2, 1920.

Case No. 370.

In re **FIELD MANUFACTURING CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

(See Vol. V, these decisions, p. 479.)

Upon consideration of the appeal and the record I am convinced that the decision of the Board of Contract Adjustment made in this case denying relief is correct, and the same is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 2, 1920.

Case No. 2558.

In re **CLAIM OF MIDVALE STEEL & ORDNANCE CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

(For decision of the Board of Contract Adjustment, see Vol. VI, p. 124.)

Upon consideration of the record in this matter the decision of the Board of Contract Adjustment is hereby affirmed in accordance with the accompanying recommendation.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 1, 1920.

Case No. 2558.

In re **CLAIM OF MIDVALE STEEL & ORDNANCE CO.**

MEMORANDUM FOR THE SECRETARY OF WAR.

ON APPEAL BEFORE THE SECRETARY OF WAR.

This is a claim for reimbursement to the extent of \$136,000 on account of losses suffered by claimant through depreciation in the value of certain materials and equipment assembled by claimant at the instance of the United States in preparation for continuing the manufacture of shell steel. Under some circumstances an implied agreement results from a request on the part of the Government that a manufacturer maintain such a supply of equipment and materials as will enable him to maintain continuity of output, while under other circumstances such an implication is negatived by the practice, business customs, acts, and statements of the parties. The circumstances tending to induce or to negative the implication of such an agreement have been considered in several previous cases and need not be here discussed at length. In my opinion, the facts, as indicated by the present record, are undistinguishable from those under which relief has been denied by you as to claims heretofore presented. Fully concurring in the conclusions stated in the decision of the Board, I recommend that relief be denied.

R. C. GOODALE,
Special Adviser.

NOVEMBER 2, 1920.

Case No. 329.

In re CLAIM OF MILWAUKEE PATENT LEATHER CO.

ON APPEAL BEFORE THE SECRETARY OF WAR.

(See Vol. V, these decisions, p. 22.)

Upon consideration of the record in this matter, the decision of the Board of Contract Adjustment is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

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NOVEMBER 4, 1920.

Case No. 726.

In re **CLAIM OF COLLIER MANUFACTURING CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

(For decision of Board of Contract Adjustment, dated June 22, 1920, see Vol. VI, p. 461.)

After careful consideration of the record, it is my opinion that no agreement, either expressed or implied, was entered into between the Collier Manufacturing Co. and any officer or agent acting under the authority, discretion, or instruction of the Secretary of War, or of the President, within the purview of the act of March 2, 1919, and relief as prayed for is, therefore, denied.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 4, 1920.

Cases Nos. 2571, 2534, 2712, 2710, 2711, 2714.

***In re* CLAIMS OF THE YOUNG, CORLEY & DOLAN CO. (INC.).**

ON APPEAL BEFORE THE SECRETARY OF WAR.

These claims were decided by the Appeal Section, War Department Claims Board, August 23, 1920, relief being denied in part. On appeal to the Secretary of War, the decision of the Appeal Section, War Department Claims Board, was affirmed. For statement of facts and decisions, see these decisions, Vol. VII, p. 393.

Upon consideration of the brief of claimant and the record in this case, I am convinced that I should not disturb the action the Appeal Section has heretofore taken in these cases.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 4, 1920.

Case No. 1144.

In re **CLAIM OF CYRUS FRENCH WICKER.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

Upon appeal to the Secretary of War the decision of the Board of Contract Adjustment dated June 19, 1920, was affirmed. (See Vol. VI, these decisions, p. 408.)

Upon consideration of the record in this case, I am convinced that the decision of the Board of Contract Adjustment denying relief is correct, and it is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 6, 1920.

Case No. 2491.

In re **CLAIM OF WESTERN INDUSTRIES CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

This claim was decided by the Board of Contract Adjustment June 17, 1920, relief being denied. On appeal, the Secretary of War affirmed the decision of the Board of Contract Adjustment and directed that further proceedings be held in this case by the President of the War Department Claims Board. In accordance with the order of the Secretary this claim was transmitted to the War Department Claims Board, November 13, 1920. (Vol. VI, these decisions, p. 917.)

Inasmuch as the War Department Claims Board and its various subordinate sections are without power under Circular No. 111 and Circular No. 19 to grant relief in a case such as is here considered, the decision of the Board of Contract Adjustment is affirmed. I have this day directed the president of the War Department Claims Board to exercise in this claim certain powers of the Secretary of War and to have further proceedings in this case.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 8, 1920..

Case No. 1844.

In re **CLAIM OF L. RICHARDSON & CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

(See Vol. IV, these decisions, p. 1310.)

Upon consideration of this case and in accordance with the attached recommendation of my advisers, the decision of the Board of Contract Adjustment is affirmed.

NEWTON D. BAKER,
Secretary of War.

AUGUST 27, 1920.

Case No. 1844.

In re **CLAIM OF L. RICHARDSON & CO. (INC.).**

ON APPEAL BEFORE THE SECRETARY OF WAR.

This is a claim under the Dent Act. It is alleged that through various announcements on the part of the Quartermaster General and the War Trade Board and through import licenses issued to claimant there arose under a custom of dealing between the claimant and the Government an implied agreement that the Government would purchase certain wool imported by this claimant from South Africa.

It is admitted that in the early part of 1918 such importations were ordinarily made without obligation, express or implied, on the part of the Government to purchase the wool, but subject to an option in favor of the Government to make such purchase. Subsequently it appears that the Quartermaster General announced his intention of exercising such option "until further notice" as to wool later imported, and in July, 1918, it was announced by the War Trade Board that thereafter no licenses for the importation of wool from South Africa would be issued for the remainder of the calendar year, except to the Quartermaster General of the United States Army.

The claimant contends that the announcement by the Quartermaster General of his intention to exercise the Government's option as to all wool is to be taken as equivalent to the exercise of such option, and as changing what had been an option into a firm contract by which the United States became obligated to buy the wool. It is also contended, in the light of the announcement by the War Trade Board that licenses for the importation of wool would only be issued to the Quartermaster General, that subsequent import licenses to claimant are to be construed as licenses to claimant as the instrument of the Quartermaster General and as implying an agreement on the part of the Quartermaster General to purchase the wool imported pursuant to such licenses.

It seems to us that these contentions are not well founded. The announcement by the Quartermaster General of his intention to exercise such options "until further notice" would seem not to be intended to increase the obligation of the United States as to such shipments, but merely to serve as a warning given in advance for the

benefit of importers that options to the United States to purchase such wool are not to be considered as mere formalities, but, in the absence of change in conditions, were likely to result in the wool being taken by the United States. As to the announcement by the War Trade Board, we think that the record clearly indicates that the plan announced was not carried out and that licenses to claimant were issued as before, subject to the option to the United States to purchase the wool.

It is accordingly recommended that the decision of the Board of Contract Adjustment be affirmed.

R. C. GOODALE,
HERBERT H. LEHMAN,
Special Advisers.

NOVEMBER 9, 1920.

Case No. 1702.

In re **CLAIM OF THE CHESAPEAKE & POTOMAC TELEPHONE CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

This claim was decided by the Board of Contract Adjustment June 25, 1920.

On appeal to the Secretary of War, the decision of the Board was affirmed.

For statement of facts and decisions, see these decisions, Volume VI, page 531.

Upon consideration of the appeal and record in this case, I am convinced that I should not disturb the decision of the Board of Contract Adjustment made, and the same is hereby affirmed.

NEWTON D. BAKER,

Secretary of War.

NOVEMBER 9, 1920.

Case No. 2453.

In re **CLAIM OF GLOBE AUTOMATIC SPRINKLER CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

This claim was decided by the Board of Contract Adjustment June 5, 1920, by denying relief. On appeal to the Secretary of War, decision affirmed. (See these decisions, Vol. V, p. 1019.)

Upon consideration of the record presented, the decision of the Board of Contract Adjustment is hereby approved and affirmed.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 9, 1920.

Case No. 2490.

In re **CLAIM OF THE WESTERN INDUSTRIES CO.**

(ON APPEAL BEFORE THE SECRETARY OF WAR.

On June 18, 1920, the Board of Contract Adjustment rendered a decision denying relief to claimant. On appeal the Secretary of War directed that the decision of the Board be vacated and that further proceedings be had looking to a settlement contract. (For decision of June 18, 1920, see Vol. VI, p. 380.)

Upon consideration of the record in this case I am convinced that the Board of Contract Adjustment was in error in holding that relief should be denied on account of default of claimant. I therefore direct that the decision in question be vacated and that further proceedings be had looking to a settlement contract fair and just to the claimant and at the same time to the benefit of the United States.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 12, 1920.

Case No. 193.

In re **CLAIM OF THE ANTRIM IRON CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

**This case was decided by the Board of Contract Adjustment March 25, 1920
Upon appeal to the Secretary of War, decision affirmed. (See Vol. IV,
these decisions, p. 640.)**

Upon consideration of the records in this case I am convinced that the decision of the Board of Contract Adjustment is correct, and the same is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 12, 1920.

Case No. 188.

In re **CLAIM OF CLEVELAND CLIFFS IRON CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

This claim was decided by the Board of Contract Adjustment March 31, 1920.

Upon appeal to the Secretary of War, decision affirmed. (See Vol. IV, p. 640, these decisions.)

Upon consideration of the records in this case I am convinced that the decision of the Board of Contract Adjustment is correct and the same is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 12, 1920

Case No. 189.

In re **CLAIM OF DESMOND CHARCOAL & CHEMICAL CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

Upon appeal to the Secretary of War, the decision of the Board of Contract Adjustment, dated March 31, 1920, was affirmed. (See Vol. IV, these decisions, p. 640.)

Upon consideration of the records in this case I am convinced that the decision of the Board of Contract Adjustment is correct and the same is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 12, 1920.

Case No. 124.

In re **CLAIM OF THOMAS KEERY CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

Upon appeal to the Secretary of War, the decision of the Board of Contract Adjustment, dated March 31, 1920, was affirmed. (See Vol. IV, these decisions, p. 640.)

Upon consideration of the records in this case I am convinced that the decision of the Board of Contract Adjustment is correct and the same is hereby affirmed.

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NEWTON D. BAKER,
Secretary of War.

NOVEMBER 12, 1920.

Case No. Sales BCA-4.

In re **CLAIM OF MAGUIRE & CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

Upon appeal to the Secretary of War, the decision of the Board of Contract Adjustment, dated May 22, 1920, was affirmed. (See Vol. V, these decisions, p. 669.)

Upon consideration of this appeal, the decision of the Board of Contract Adjustment is affirmed.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 12, 1920.

Case No. 197.

In re **CLAIM OF MELVILLE CORBETT CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

Upon appeal to the Secretary of War, the decision of the Board of Contract Adjustment, dated April 6, 1920, was affirmed. (See Vol. VI, p. 735.)

Upon consideration of the records in this case, I am convinced that the decision of the Board of Contract Adjustment is correct, and the same is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 12, 1920.

Case No. 1767.

***In re* CLAIM OF THE MODEL STEAM LAUNDRY.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

Upon appeal to the Secretary of War, the decision of the Board of Contract Adjustment, dated April 3, 1920, was affirmed. (See Vol. IV, these decisions, p. 902.)

Upon consideration of the petition for rehearing, brief, and record in this case, I am convinced that the order of the Board of Contract Adjustment denying relief is correct. The same is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 12, 1920.

Case No. 2659.

In re **CLAIM OF THE A. R. MOSLER CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

CLAIM AND DECISION.—This claim was disposed of by the Board of Contract Adjustment June 30, 1920, granting relief in part. Upon appeal to the Secretary of War, the decision of the Board of Contract Adjustment was affirmed, with the exception of Item No. 5, and was remanded to the Board for further consideration of this item. (For decision of June 30, 1920, see Vol. VI, p. 1036.)

Upon consideration of the appeal and record in this case, the decision of the Board of Contract Adjustment is affirmed with the exception of Item No. 5. In my opinion the United States is not entitled to a credit for any sums claimant may make by reason of subleasing of the building in question. The case is therefore returned for further action by the Appeal Section on item No. 5.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 13, 1920.

Case No. 1148.

In re **CLAIM OF FRENCH MANUFACTURING CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

This claim was decided by the Board of Contract Adjustment April 3, 1920, by denying relief to claimant. Claimant appealed to the Secretary of War, who, on November 13, 1920, remanded the case to the Board for further proceedings. For decision of April 3, 1920, see Vol. IV, p. 909.

Upon consideration of the record herein it is ordered that the decision of the Board of Contract Adjustment be set aside; that further proceedings be had; that additional testimony be taken and the case decided in accordance with the law and evidence as shown in such further proceedings.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 13, 1920.

Case No. 2497.

In re **CLAIM OF THE T. A. GILLESPIE CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

Upon appeal to the Secretary of War, the decision of the Board of Contract Adjustment, dated June 4, 1920, was affirmed. (See Vol. V, p. 966.)

Upon consideration of the appeal and the record in this case I am convinced that the action of the Board of Contract Adjustment of June 4, 1920, denying relief is correct, and their action is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 13, 1920.

Case No. 2271.

In re **CLAIM OF GLOBE AUTOMATIC SPRINKLER CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

Decisions were rendered in this case by the Board of Contract Adjustment on January 27, 1920, and May 26, 1920. On appeal to the Secretary of War, decision of May 26, 1920, affirmed. (See Vol. III, p. 216, and Vol. V, p. 782, these decisions.)

Upon consideration of the record presented the accompanying decision of the Board of Contract Adjustment is hereby approved and affirmed.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 13, 1920.

Case No. 2660.

In re **CLAIM OF WM. B. PERRY ELECTRIC CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

This claim was decided by the Board of Contract Adjustment June 22, 1920, denying relief to claimant. Upon appeal to the Secretary of War, decision affirmed. (See Vol. VI, these decisions, p. 466.)

Upon consideration of the entire record the decision of the Board of Contract Adjustment is hereby approved and affirmed.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 16, 1920.

Case No. 331.

In re **CLAIM OF HENRY H. LIPPERT.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

This claim was decided by the Board of Contract Adjustment May 18, 1920.

Upon appeal to the Secretary of War, decision affirmed. (See Vol. V, these decisions, p. 466.)

Upon consideration of the appeal and record in this case I am convinced the decision of the Board of Contract Adjustment denying relief is correct, and the same is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 16, 1920.

Case No. 2700.

In re **CLAIM OF PIEDMONT & NORTHERN RAILWAY CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

See Vol. VI, these decisions, p. 298, for decision of Board of Contract Adjustment.

Upon consideration of the record presented the accompanying decision of the Board of Contract Adjustment is hereby approved and affirmed.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 16, 1920.

Case No. 712.

In re **CLAIM OF STERLING ENGINE CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

This claim was decided by the Board of Contract Adjustment April 18, 1920.

Upon appeal to the Secretary War, decision affirmed. (See Vol. V, these decisions, p. 45.)

Upon consideration of the appeal and the record in this case I am convinced that the decision of the Board of Contract Adjustment denying relief is correct and the same is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 17, 1920.

Case No. 251.

In re **CLAIM OF THE AMERICAN SASH AND DOOR CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

(See Vol. IV, these decisions, p. 210, and Vol. VI, p. 121.)

Upon consideration of the record presented, the decision of the Board of Contract Adjustment is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 17, 1920.

Case No. 2523.

In re **CLAIM OF FRENCH MANUFACTURING CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

- **The Board of Contract Adjustment rendered a decision April 3, 1920, denying relief to claimant. On appeal, the Secretary of War directed that the decision of the Board be set aside and further proceeding held. (For first decision, see Vol. IV, p. 911.)**

Upon consideration of the record in this matter, it is directed that the decision of the Board of Contract Adjustment be set aside and that further proceedings be had by the Appeal Section, War Department Claims Board, to determine whether or not the action of the Purchase Section was correct.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 17, 1920.

Case No. 2379.

In re CLAIM OF THE UNION TWIST DRILL CO.

ON APPEAL BEFORE THE SECRETARY OF WAR.

(For decision of Board of Contract Adjustment, see Vol. IV, p. 893.)

Upon consideration of the entire record, the decision of the Board of Contract Adjustment is hereby approved.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 17, 1920.

Case No. 10.

In re **UNITED STATES INDUSTRIAL CHEMICAL CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

On June 8, 1920, the Board of Contract Adjustment rendered a decision granting relief in part. Decision of Board affirmed on appeal to Secretary of War. (See Vol. VI, p. 65.)

Upon careful consideration of the record in this matter, the decision of the Board of Contract Adjustment is affirmed.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 20, 1920.

Case No. 2797.

***In re* CLAIM OF THE ALUMINUM CASTINGS CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

(See Vol. VI, these decisions, page 554.)

Upon consideration of the appeal and record in this case, the decision of the Board of Contract Adjustment is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 20, 1920.

Case No. 1532.

In re **CLAIM OF THE AMERICAN MAGNESIUM CORPORATION.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

(See Vol. V, these decisions, p. 617.)

Upon consideration of the appeal and record in this case, the decision of the Board of Contract Adjustment, denying relief, is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 20, 1920.

Case No. 2247.

In re **CLAIM OF THE ANNISTON STEEL CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

(See Vol. III, these decisions, p. 767.)

Upon consideration of the appeal and record the decision of the Board of Contract Adjustment is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 20, 1920.

Case No. 2346.

In re CLAIM OF B. AXE & CO.

ON APPEAL BEFORE THE SECRETARY OF WAR.

(See Vol. V, p. 42.)

Upon consideration of the appeal and record in this case the order of the Board of Contract Adjustment denying relief is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 20, 1920.

Case No. 2306.

In re **CLAIM OF THE BLOCH CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

(See Vol. IV, these decisions, page 482.)

Upon consideration of the record and appeal in this case the decision of the Board of Contract Adjustment denying relief is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 20, 1920.

Case No. 521.

In re **CLAIM OF EASTERN ZINC REFINING CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

(See Vol. V, these decisions, p. 675.)

Upon consideration of the appeal and record in this case the decision of the Board of Contract Adjustment is affirmed.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 20, 1920.

Case No. 246.

***In re* CLAIM OF FARRAGUT TEXTILE MANUFACTURING CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

(See Vol. VI, these decisions, p. 527, and Vol. V, pp. 558 and 1011.)

1. Upon consideration of the record presented the accompanying decision of the Board of Contract Adjustment, dated June 24, 1920, is hereby approved and affirmed.

2. A certificate of fair value and voucher will issue to claimant for \$7,205.19, covering 2,007 yards of puttee cloth taken over by the United States, if such certificate and voucher have not already issued.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 20, 1920.

Case No. 2436.

In re **CLAIM OF THE TRUCSON STEEL CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

(See Vol. VI, these decisions, page 144.)

Upon consideration of the record and appeal in this case the decision of the Board of Contract Adjustment denying relief in this claim is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 20, 1920.

Case No. 2146.

In re **CLAIM OF WEST STEEL CASTING CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

The Board of Contract Adjustment rendered a decision in this case May 12, 1920, granting relief in part. Claimant appealed to the Secretary of War on the award under the above decision, and case was remanded to Board for further proceedings. (For decision of May 12, 1920, see Vol. V, p. 332.)

The case comes to me on appeal from an award made by the award section of the Board of Contract Adjustment granting claimant partial relief.

Upon consideration of the record presented, it is directed that further proceedings be had in accordance with the attached memorandum of the vice chairman, War Department Claims Board.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 19, 1920.

Case No. 2146.

In re **CLAIM OF WEST STEEL CASTING CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

MEMORANDUM FOR THE SECRETARY OF WAR.

This claim was originally decided by the Board of Contract Adjustment on May 12, 1920, the claim being for materials consisting of coal, coke, pig iron, and various ores claimant alleged it had on hand and had purchased at the request of Government officers, the decision being as follows:

"1. There was an implied agreement within the purview of the act of March 2, 1919, under which claimant was authorized and directed to procure, and did procure, sufficient raw materials and coke to keep its production at the quantities specified in its formal contract and as modified by the supplement thereto of April 16, 1918, for the six months embraced in the winter period of 1918-19, which agreement can be adjusted, paid, or discharged by the Secretary of War.

"2. The fair and equitable basis on which payment of the claim, now asserted under the said agreement, should be made is to determine the quantities of raw materials and coke necessary for the agreed production for the six months period above defined and deduct therefrom the quantities used in the completion of the four thousand sets of wheels embraced in the original contract. On the remaining quantities the claimant should be paid the difference between the cost or contract price and the market price as of a date reasonably subsequent to November 12, 1918."

Thereupon the said decision and file were forwarded to the District Ordnance Claims Board at Cleveland, Ohio, and as that Board had ceased to function was finally returned to the Board of Contract Adjustment with the suggestion that, as said Board had an award section, it proceed to make the necessary award.

The Award Section of the Board of Contract Adjustment thereupon proceeded to make up an award basing the same partly upon an audit and report that had been filed with the Board under date of January 14, 1920, by one of its accountants, and under date of June 29, 1920, offered claimant the sum of \$4,245 in settlement of its claim, which claimant on July 6 refused to accept and thereupon noted its appeal.

The chief allegation on its appeal is that at the hearing before the Board of Contract Adjustment it was not allowed to offer any

evidence as to its losses, and that the award made by the Award Section was thereby made without an opportunity for claimant to be heard, and further that the said award was not in accord with the decision of the Board of Contract Adjustment, and that it failed to take into consideration the sum of \$29,988.20 claimant was compelled to pay to cancel contracts it had outstanding for coke and other materials, and that the amount of depreciation allowed by said Award Section was based as of the depreciation in December, 1918, during which month the War Industries Board was still dictating the prices, and that the said prices were not indicative of the prices actually prevailing after the month of December, and that the prices prevailing after the month of December are the prices that should be used in figuring claimant's loss and that claimant should therefore have an opportunity to appear before the Board and give evidence showing what the prices were and what losses it suffered by reason of the decline in price of the materials and supplies it had ordered.

Page 57 of the transcript of the record sustains claimant's contention that it was not allowed to present any evidence at its hearing before the Board touching its losses, but was compelled to submit only evidence tending to show the existence of a contract. Maj. O'Neill writing the opinion, made this statement:

"During the recess I have conferred with Col. Delafield with respect to a matter of practice. We will not take any testimony in this hearing with respect to the amounts that might be due under the contract if one is found. That will be for another Board to determine. The testimony in this hearing will be confined to whether or not a contract was entered into and, if there was a contract, what was the nature, terms, and conditions of the contract."

Since the claimant was not allowed an opportunity to produce evidence tending to show its losses and alleges it can submit evidence to prove the award as made up is in error, I am of the opinion that the award tendered claimant by the Award Section of the Board of Contract Adjustment should be set aside and vacated and that the decision and file in this case should be transmitted by the Appeal Section to the Ordnance Section, War Department Claims Board, before which claimant should be allowed to appear for the purpose of proving its losses, if any. I am further of the opinion that at such time the said Ordnance Section should take evidence to show whether or not the materials for which claimant is making claim were so used by it; that, notwithstanding the decline in price of the same, there was no ultimate or final loss; in other words, that the claimant in using said materials, coke, and coal in its commercial work actually suffered no loss, notwithstanding the fact that it could possibly have gone out into the open market and purchased materials

at a less figure than those so used by it had cost; and if it should appear that the claimant by such use of material suffered no actual loss, then no award should be made covering the same.

I am further of the opinion that when the Ordnance Section comes to take testimony and to audit this account the fact that the claimant failed to cancel certain or all of its contracts for material and supplies until after the 1st of January, 1919, should be taken into consideration, for it may be that by such failure claimant was compelled to pay a higher cancellation price than if it had canceled its contracts for supplies and materials immediately after the armistice; and if it appears that by such delay in cancellation claimant was compelled to pay a sum in excess of that which it would have cost to have canceled these contracts prior to the date it did cancel, then, in that event, claimant should be granted no relief for such loss its action in not canceling immediately may have caused. It must have been apparent to claimant immediately after the signing of the armistice that it would receive no future contracts, and the mere fact that the Government allowed claimant to complete the contract it then had on hand for 4,000 sets of wheels did not in any way relieve it from the necessity of using every means at its command to minimize its losses. In any award offered claimant by the Ordnance Section due consideration should be given to the salvage offer made by said claimant for certain Government machinery now in its possession, as well as the amount of civilian business claimant was engaged in during November and December, 1918, and the amount of materials necessary to complete said orders.

J. A. HULL,
Colonel, J. A.,
Vice Chairman W. D. C. B.

NOVEMBER 21, 1920.

Case No. 490.

In re **CLAIM OF FRIES & FRIES.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

(See Vol. V, these decisions, p. 849.)

Upon consideration of the appeal and record in this case, I am convinced the decision of the Board of Contract Adjustment denying relief is correct, and the same is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 21, 1920.

Case No. 2781.

In re **CLAIM OF SOUTHERN OVERALL CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

This claim was disposed of by the appeal section, War Department Claims Board, July 29, 1920, by denying relief to claimant. The decision of Board denying relief affirmed on appeal to Secretary of War. (See Vol. VII, these decisions, p. 111.)

Upon consideration of the records in this case the decision of the Board of Contract Adjustment denying relief is affirmed.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 23, 1920.

Case No. Sales B. C. A.-17.

In re **CLAIM OF THE AERONAUTICAL EQUIPMENT CO. (INC.).**

ON APPEAL BEFORE THE SECRETARY OF WAR.

This claim was decided by the Board of Contract Adjustment adversely to claimant on June 30, 1920. On appeal to the Secretary of War, decision of the Board vacated. (See Vol. VI, p. 577.)

I do not concur in the views of the Board of Contract Adjustment as to the powers of the Secretary of War, and I direct that the decision in the above-entitled case be vacated.

It is further directed that this case be transmitted to the Ordnance Salvage Board to state a debit and credit account and thereupon the entire file with such statement be transmitted to the Chief of Finance for appropriate action.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 23, 1920.

Case No. 719.

In re **MATTER OF THE CLAIM OF ART-IN-BUTTONS (INC.).**

ON APPEAL BEFORE THE SECRETARY OF WAR.

(See Vol. VII, these decisions, p. 62.)

Upon consideration of the appeal and record in the case, the decision of the Board of Contract Adjustment denying relief is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 23, 1920.

Case No. 2255.

In re **CLAIM OF C. & C. RAINCOAT CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

The Board of Contract Adjustment rendered a decision in this case granting relief. On appeal, the Secretary of War directed that an order denying relief issue. (See Vol. IV, these decisions, p. 1021, and Vol. VI, p. 983.)

Upon consideration of the appeal and record in the above case, I am convinced that the action of the Board of Contract Adjustment is not correct and that an order denying relief should be entered so far as any increased price under proxy signed contract No. 2060-B is concerned.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 23, 1920.

Case No. 2138.

In re **CLAIM OF PITTSBURGH MODEL ENGINE CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

(See Vol. VII, these decisions, p. 636.)

Upon consideration of the appeal and record in this case, I am convinced that the action of the appeal section of the War Department Claims Board is correct, and additional relief is denied.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 23, 1920.

Case No. 2492.

In re **CLAIM OF THE PRESTON CHEMICAL CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

(See Vol. V, these decisions, p. 92.)

Upon consideration of the appeal and record in this case the decision of the Board of Contract Adjustment is affirmed.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 24, 1920.

Case No. 1502.

In re **CLAIM OF REPUBLIC IRON & STEEL CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

(See Vol. VI, these decisions, p. 665.)

Upon consideration of the appeal and record in this case I am convinced that the decision of the Board of Contract Adjustment denying relief is correct, and the same is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 30, 1920.

Case No. 2248.

In re **CLAIM OF THE ANNISTON STEEL CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

Decision in this case was rendered by the Board of Contract Adjustment February 19, 1920, denying relief. On appeal, the Secretary of War remanded the case to the Board for further proceedings. (For decision of Feb. 19, 1920, see Vol. III, p. 862.)

ORDER BY THE SECRETARY OF WAR.

Upon consideration of the entire record it is directed that further proceedings be had by the Appeal Section, War Department Claims Board, in accordance with the recommendations contained in the accompanying memorandum.

NEWTON D. BAKER,
Secretary of War.

preparation to perform the contract, for the expense of which allowances are included in the award offered; and

(c) If so, to determine the reasonable value of such betterments: and

(d) If the amount of rental determined as hereinbefore suggested exceeds the value of the betterments so determined, that the appeal section ascertain the amount of such difference and return the record to the ordnance section with instructions to increase its offer of award by the amount as so ascertained by the appeal section;

(e) If the appeal section finds that the value of the betterments exceeds a reasonable allowance for use and occupation determined as hereinbefore suggested, the decision of the Board of Contract Adjustment should be modified to conform to such finding; and

(f) In any event, upon a reconsideration of the case by the appeal section, the claim should be disposed of as if the suggested alternative relief had been brought before the appeal section by appeal in the usual manner; and

(g) The opinion of the Board of Contract Adjustment should be modified accordingly;

(h) That part of the decision of the Board of Contract Adjustment denying relief to claimant for depreciation in the value of the plant should be affirmed.

J. A. HULL,
Colonel, J. A.

NOVEMBER 30, 1920.

Case No. 2456.

In re **CLAIM OF BREESE AIRCRAFT CORPORATION.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

This claim was decided by the Board of Contract Adjustment June 12, 1920.

On appeal to the Secretary of War, the decision of the board was affirmed except as to Item 1, and was remanded to the appeal section, War Department Claims Board, for further proceedings on this item. (For decision of June 12, 1920, see Vol. VI, p. 884, these decisions.)

Upon consideration of the record in this matter it is directed that the decision of the Board of Contract Adjustment be approved and affirmed except as to Item 1 of the claim, and that further proceedings be had by the appeal section, War Department Claims Board, in order to determine the amount due claimant as profit and bonus in connection with contract No. 2538-1 for Penguin spare parts.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 30, 1920.

Case No. 2625.

In re **CLAIM OF LEHIGH VALLEY RAILROAD CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

For decision of the Board of Contract Adjustment, see Vol. VI, p. 392.

Upon consideration of the record presented, the accompanying decision of the Board of Contract Adjustment is hereby approved and affirmed.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 30, 1920.

Case No. 2909.

In re **CLAIM OF E. L. LONG.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

This claim was decided by the appeal section, War Department Claims Board, October 5, 1920. Upon appeal to the Secretary of War, decision affirmed. (See Vol. VII, these decisions, p. 839.)

Upon consideration of the record presented the accompanying decision of the appeal section, War Department Claims Board, is hereby approved and affirmed.

NEWTON D. BAKER,
Secretary of War.

NOVEMBER 30, 1920.

Case No. 2099.

***In re* CLAIM OF EMPLOYEES OF THE MINNEAPOLIS STEEL & MACHINERY CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

On June 3, 1920, the Board of Contract Adjustment issued its decision (published in Vol. VI).

On August 11, 1920, the Secretary of War reversed the decision of the Board of Contract Adjustment and ordered that the same be set aside and vacated, and on August 28, 1920, the appeal section, War Department Claims Board, formerly Board of Contract Adjustment, issued its opinion setting aside and vacating the decision of the Board of Contract Adjustment of June 3, 1920, and canceling, revoking, and recalling its document setting forth the nature, terms, and conditions of the agreement and certificate form "C."

On November 30, 1920, the Secretary of War in the following decision ordered his former opinion reversed and the opinion of the Board of Contract Adjustment of June 3, 1920, together with certificate form "C" and the document setting forth the nature, terms, and conditions of the agreement, reinstated and made of full effect.

For all the facts in the case reference is made to the decision of the Board of Contract Adjustment of June 3, 1920 (published in Vol. VI).

Because of many unusual circumstances of fact entering into the foundation upon which this claim is said to be based, the matter has been one of great difficulty and has aroused sharp and irreconcilable difference of opinion upon questions of law and questions of fact. There has, however, been little difference of feeling on the part of those who have carefully examined the record as to the equities involved. Whether or not a legal basis exists for relief by the Secretary of War, and, if so, whether the character of the claims is such that substantial equity can be effectively done, are the questions now to be decided on this rehearing.

The War Department had a contract with the Minneapolis Steel & Machinery Co. for the production of munitions. The contract contained a clause authorizing the company to bring to the attention of the Secretary of War any condition arising in its works likely to cause labor disputes and interference with the continuity of production. The contract then proceeded to authorize the Secretary of War, in such case, to consider the questions upon which the threatened

labor difficulty rested and make such adjustment of them in the interest of the Government as he might deem necessary, and to adjust *pro tanto* the compensation to the company.

No such notice was at any time given to the Secretary of War by the company, nor did he intervene under this clause of the contract; but during the course of manufacture under the contract, through entirely unofficial agencies, the attention of the War Labor Board was attracted to the labor situation in the Minneapolis district, and it sent representatives and agents to that district to investigate, conciliate, and report. In all some 65 industrial and manufacturing establishments were within the field of the wage inquiry thus made. The recommendations or orders of the War Labor Board with regard to most of them were accepted and acted upon by employers. All these plants, however, were not engaged in work for the Government of the United States, and it may be assumed that any additional cost to employers by reason of changed wage scales so accepted were either absorbed by the employers or covered by increased prices of products. In any case no claim against the Government under the Dent Act was presented with regard to them. The Minneapolis Steel & Machinery Co., however, was employed under a direct contract with the War Department in the manufacture of munitions. The activities of the War Labor Board with regard to industrial conditions in the Minneapolis district, therefore, concerned the War Department and affected continuity of manufacture of indispensable munitions. The War Labor Board having adjudged an increase of pay to the men employed by the Minneapolis Steel & Machinery Co., and that company having refused to accept or act upon the award so made, representatives of the employees presented for the consideration of the War Department a claim under the Dent Act based upon the theory that the award of the War Labor Board, taken together with the actions, statements, and assurances of representatives of that Board, engendered a contract between the men and the War Department which it was within the power of the Secretary of War equitably to carry out.

The claim was considered by the Board of Contract Adjustment, which decided in favor of its validity. The standing committee of the War Department Claims Board, examining the work of the Board of Contract adjustment, reached the judgment that its decision was wrong on two grounds: (1) That the claim had not been "presented prior to June 30, 1919," and was therefore barred by the limitations imposed in the Dent Act; and (2) that the agents of the War Labor Board were without authority to make any such contractual promise between the employees of the company and the Government, as they were alleged to have made, and that their

unauthorized action was not validated by the subsequent adjudication of the War Labor Board itself; that, in short, there was no contract, formal or informal, to be considered by the Secretary of War.

This opinion of the standing committee of the War Department Claims Board was referred to the office of the Judge Advocate General of the Army, where it received the earnest consideration of eminent lawyers, who reached unanimously the judgment of concurrence with the standing committee. I, therefore, reversed the action of the Board of Contract Adjustment. Instant and urgent requests for a rehearing were made; a rehearing was had, and the decision now to be made must be the final action of the Secretary of War.

Before considering the views upon which my legal advisers are substantially a unit it may be well to dispose of one or two minor matters.

The record contains evidence introduced to show that there was in fact no labor disturbance as between the employer and the employees of the Minneapolis Steel & Machinery Co.; that production in that plant was uninterrupted; and that certain officers of the Army stationed in the plant as inspectors of production knew of no conditions which threatened to interfere with the prompt and continuous deliveries of munitions. From this and other evidence of like import it is urged that the dispute which the War Labor Board undertook to consider was fictitious and was more irresponsible agitation by outside persons than a real condition in the labor field needing adjustment or conciliation. It may be conceded that the record, so far as it goes, on this subject is persuasive, but this was not a central or pivotal point in the controversy, and I have no means of knowing what a more intimate search for the real facts would have shown by supplementing the record on this subject with the testimony of workers in the Minneapolis field as to the real facts underlying the surface indications of agreement and satisfaction. The point, however, is immaterial: The War Labor Board took cognizance of the situation; the Minneapolis Steel & Machinery Co. urged upon it that there was no controversy, and the War Labor Board decided that there was, and on the basis of its finding that such a controversy did exist, and that the public interest required it to moderate and adjust the controversy, proceeded, through its agents and by its formal judgments, to act. If, therefore, the War Labor Board was such an agency as had any power to speak, its determination of the discretionary question is final, and an authorized promise made by it is binding, even though its judgment may have erred as to the necessity of making that promise in order to preserve those

conditions in industry essential to production in the interests of the Government.

The Dent law authorized the Secretary of War to consider and adjust informal contracts arising out of the acts of agents of the President, as well as out of the acts of agents of the Secretary of War himself. It is, therefore, important to determine whether or not the War Labor Board was, in fact, an agent of the President, and, if so, the scope of its authority.

In creating the War Labor Board, the President said: "The powers, functions, and duties of the National War Labor Board shall be to settle, by mediation and conciliation, controversies arising between employers and workers in fields of production necessary for the effective conduct of the war, or in other fields of national activity, delays, and obstructions which might, in the opinion of the National Board, affect detrimentally such production. * * * and to summon the parties to controversies for hearing and action by the National Board in event of failure to secure settlement by mediation and conciliation." This statement of the powers and functions of the Board is in very general terms, and rather leaves the scope of its authority to the discretion of the Board after stating the high national purpose for which the Board was created. The field of activity committed to it was varied, widespread and delicate; no narrow and circumscribed rules for its guidance could be laid down, but the object of serving the vital national interests by foreseeing and adjusting threatening labor disturbances so as to prevent interruption in the manufacture and delivery of essential supplies was clearly stated, and it is fair to assume that the President intended the Board to have as much authority as he himself had, reasonably necessary and appropriate to achieve the purpose committed to it. If the President had sent for the Secretary of War and told him that he personally had examined the labor situation in Minneapolis, and had come to the conclusion that the workers in the Minneapolis Steel & Machinery Co. should be given additional compensation in order to enable them to meet the advanced cost of living, and to devote themselves contentedly to the important production upon which they were engaged, and that he had told the employees in that plant to go forward with production and that he would see that they were additionally and justly compensated, there can not be any reasonable question that such a statement and such action by the President would have constituted a claim under the Dent Act which the Secretary of War would be authorized to pay and adjust. Instead of doing this, however, the President created the War Labor Board to deal with all situations of this sort, and to devote an amount of time to the general labor situation which it was quite impossible for the President to extract from his overburdened hours.

In my opinion the action of the War Labor Board was, therefore, the action of the President, and is equally binding upon me.

The War Labor Board summoned the Minneapolis Steel & Machinery Co. to appear before it when it was investigating and considering this matter; the company did appear with pleas to the jurisdiction and denials of controversy, but the War Labor Board overruled the pleas and found affirmatively as to the existence of the controversy; it made its order in the spring of 1919 retroactive to the date at which the War Labor Board formally assumed jurisdiction of the controversy. This order the Minneapolis Steel & Machinery Co. declined to carry out. In the meantime agents of the War Labor Board, in public addresses and otherwise to individuals and mass meetings of the workers, maintained the *status quo* by assurances explicitly and publicly given that the War Labor Board, which had taken cognizance of the controversy, would make a just decision, and that the men could rely upon receiving compensation upon such an award.

I do not think it necessary to find that these workers would have engaged in a strike but for the promises of the representatives of the War Labor Board, and to regard their abstention from striking as consideration moving from them to the Government for the informal contract upon which they seek to recover. It may well be that they would not have struck, but that many of them were impressed with the injustice of their situation is clear, and the War Labor Board, which had the whole national field of industrial relations, regarded itself as justified in making an award in this case in fairness to the workers. The preservation of a sense of fairness in the workers of the country generally was essential in the national interest, and steps taken by the War Labor Board to create and preserve a belief on the part of the workers that the Government was dealing fairly with the labor was in itself consideration enough to sustain any promise or award made by the War Labor Board appropriate to that end. In any case, the claimants here did continue at work; they did submit their controversy to the War Labor Board; they acquiesced in its orders and its judgments; and there is evidence in the record that they relied upon the promises of its agents.

It is said that these agents were without authority to make the promises they did make. That question is swallowed up in the subsequent order of the Board itself which entered formal judgments, merging any previous promise in a final award covering a wage schedule which, by the terms of the order of the Board, was to be applied within definite limits of time and to all of the workers covered by its provisions.

It is urged that it is difficult if not impossible to tell with whom this contract was made so far as the workers are concerned; that

there may have been persons at the mass meetings who had no sense of grievance, who felt themselves adequately compensated, and who were not in the position of requesting any increase of pay, and that it is now impracticable to determine to whom the extra pay should be awarded. That, however, is a practical difficulty affecting the administration of any order now made, rather than the propriety of the order, and I think can be disposed of by saying that any claimed agreement between any particular worker present at a mass meeting and the Government by reason of a statement made at the mass meeting by a representative of the War Labor Board is, as suggested above, merged in the order of the Board which adjudged a schedule to be applied to all the workers.

In the nature of the case these claims were difficult of individual presentation. Many of them are for small amounts for the benefit of people whose primary contractual relationship was not with the Government but with a private employer, men who were unlearned in the law and could not be expected to know by what means the War Labor Board would carry out its awards. To have required each of these claimants to present formally his claim to the Secretary of War would have required of each of them that he be wise enough to resolve some of the questions about which my legal associates in this matter are themselves at variance. It is to be observed, however, that there is nothing in the Dent Act which requires claims to be presented to the Secretary of War or to the War Department, and I believe it wholly within the equities and intendments of that act that when the claims of these workers for increased compensation had been so far drawn to the attention of the War Labor Board that that Board assumed jurisdiction of them and made final awards after full consideration of all the factors in the dispute that such presentation is presentation to an agent of the President and satisfies the requirement of presentation in the Dent Act as a prerequisite to authority in the Secretary of War to pay and adjust a claim. The whole purpose of that provision in the Dent Act was to prevent the Government from being surprised by the presentation of claims after the records of its intricate war business had been scattered and the persons familiar with its business ceased to be in the service or available to enable the Government to know all the circumstances of any such claim. The matter herein under consideration was actively pending before representatives of the President, a voluminous record of investigation, inquiry, and argument made on the whole subject long before the Dent law, and the Government was thus in possession not only of knowledge of the controversy but of record evidence as to its merits and details. It is, of course, true that many representatives of the Government are such representa-

tives in a limited capacity and that notice to them of things which they are not authorized to receive notice upon does not constitute notice to the Government; but if I am right in my earlier holding that the War Labor Board was such an agent of the President as is described in the Dent law, namely, such an agent of the President as had authority to create an obligation which the Secretary of War could pay and adjust, and such agent has in fact undertaken both to create the obligation and to liquidate it, then it would follow as a matter of course that notice to it with regard to a matter within its jurisdiction would be notice to the Government.

I think there is no bar to the action which I am about to take in the fact that the Minneapolis Steel & Machinery Co. failed to call the attention of the Secretary of War to a threatened controversy, or refused to acquiesce in the action of the War Labor Board. The contract provided one way in which a labor dispute might be adjusted, but it did not paralyze the Government and prevent it from adjusting such a dispute if the employer closed his eyes to the existence of the controversy, or preferred to deny its existence either because he did not see it or for interests of his own. The power of the President to preserve industrial peace and continuity of production during the war could not be made to depend upon the willingness of a contractor, representing one side only of a threatened labor controversy.

I desire to express my frank admiration for the learning and zeal with which this intricate and difficult question has been considered by my associates in the Board of Contract Adjustment, the standing committee of the War Department Claims Board, and the office of the Judge Advocate General of the Army. I have consciously taken a somewhat broader view of the legal power conferred upon the Secretary of War by the Dent Act than they felt free to take, and I have regarded as the purpose of the Dent Act the gift of authority to the Secretary of War to do equity as between the Government and those who have rendered service or at the request of the Government produced supplies useful to the Government in the emergency. I therefore direct that this claim be returned to the standing committee of the War Department Claims Board with direction that it regard the decision of the Board of Contract Adjustment sustaining the claims of the employees as final, and that it proceed by such agencies as are appropriate and necessary to pay and adjust the claims of the men which I now hold to have been contracts created by the War Labor Board as an agent of the President in and about the production of munitions and supplies for the War Department.

· NEWTON D. BAKER,
Secretary of War.

NOVEMBER 30, 1920.

Case No. 2369.

In re **CLAIM OF ORGANIC SALT & ACID CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

(For decision of Board of Contract Adjustment, see Vol. V, p. 115.)

Upon consideration of the appeal and record in this case the decision of the Board of Contract Adjustment is affirmed in accordance with the accompanying views of the special advisers.

NEWTON D. BAKER,
Secretary of War.

AUGUST 25, 1920.

Case No. 2369.

In re **CLAIM OF ORGANIC SALT & ACID CO.**

MEMORANDUM.

There is no brief nor any petition of appeal pointing out the precise points on which it is contended that the decision was erroneous. The testimony, however, and the discussions which took place while it was being taken sufficiently indicate the situation.

As to the items of this claim, it appears that nothing is now claimed in connection with the triphenyl phosphates (S. M., p. 77), although the statement of claim would seem to indicate that much of it did relate to that chemical; how much nowhere appears. If there were such a claim now pressed, nothing could be awarded; the evidence fails to show any agreement, express or implied, to take 300,000 pounds, or any other amount in excess of the poundage named in the contract of May 31, 1918. Completion of that contract and payment in full would amortize all expense connected with the triphenyl phosphate; and if it did not amortize the whole expense, there was no other contract to absorb it and no agreement to reimburse for it.

As to the other two chemicals, no agreement, express or implied, is shown other than the five contracts and two orders enumerated in the decision. So much of these items as pertained to these seven agreements would be amortized if they had been completed; and if any part of the items did not pertain to such contracts, there was no agreement, upon the faith of which they were made, which would authorize an award under the Dent Act.

Claimant failed to satisfy the auditor or the Air Service Claims Board or the Board of Contract Adjustment that these items should be amortized through adjustment upon cancellation, and the evidence before the latter Board was too vague to warrant any decision other than the one it made.

I recommend that the decision of the Board be affirmed.

HENRY LACOMBE,
Special Adviser.

AUGUST 25, 1920.

Case No. 2369.

In re **CLAIM OF ORGANIC SALT & ACID CO.**

I have carefully gone over the record in this case, and I do not find that the expenditures on which the claimant bases his claim pertain to the contracts which were awarded to the contractor and later terminated by the Government.

I recommend, therefore, that the decision of the Board of Contract Adjustment be affirmed.

HERBERT H. LEHMAN,
Special Adviser to the Secretary of War.

NOVEMBER 1, 1920.

Case No. 1454.

In re **CLAIM OF CALIFORNIA CAP CO.**

- 1. CLAIM AND DECISION.**—Facts are stated in opinion denying relief reported in Volume V, at page 145. On appeal the Secretary of War instructed this section to find an agreement between claimant and the Ordnance Department. Held, agreement exists.

Maj. Hill writing the opinion of the Board.

ON RECONSIDERATION.

1. From the decision of the Board of Contract Adjustment denying relief, reported in Decisions, volume 5, at page 145, claimant appealed to the Secretary of War.

2. This case was returned to this section with the following order of the Secretary of War:

"Upon consideration of the record in this matter, it is directed that further proceedings be had by the Appeal Section, War Department Claims Board, in accordance with the accompanying recommendation of the Special Advisers."

3. The memorandum of the Special Advisers contains the following recommendation:

“ We recommend, therefore, that the Board of Contract Adjustment find that an agreement existed between the Ordnance Department and the claimant company, and that the Claims Board of the Ordnance Department be instructed to investigate the loss to the claimant company, if any, by reason of the failure of the War Department to take over the fulminate of mercury and metal parts described above, and make adjustment accordingly.

“(Signed) **HERBERT H. LEHMAN,**
“*Special Adviser.*

“(Signed) R. C. GOODALE,
“Special Adviser.”

4. By direction of the Secretary of War, as set forth in the foregoing order, the decision of the Board of Contract Adjustment dated May 3, 1920, denying relief, is hereby vacated and set aside.

5. By direction of the Secretary of War and in accordance with the attached recommendation of the Special Advisers, this section finds that there existed on or about November 5, 1918, an informal agreement between the Ordnance Department and the claimant, whereby

the Ordnance Department agreed to protect claimant from loss on claimant's existing contracts for the purchase of fulminate of mercury and metal caps for use as a subcontractor in making Mark IV and Mark V detonators, in consideration of the execution by claimant of a contract with the Ordnance Department to load detonators.

DISPOSITION.

• This section will make and transmit a statement of the nature, terms, and conditions of the agreement, and certificate "C," to the Ordnance Section for action in accordance with the recommendation of the special advisers.

Lieut. Col. McKeeby and Lieut. Tabb concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

NOVEMBER 2, 1920.

Case No. 2876.

In re **CLAIM OF CHAPMAN PRICE STEEL CO.**

1. **CONTRACT.**—Where a prospective contractor refused to sign the formal contract until changes had been made in certain material terms thereof, and such changes were never made, and the contract was never signed, there was no meeting of the minds, and no informal agreement was entered into between claimant and the United States.
2. **FACILITIES.**—Where a prospective contractor made expenditures for facilities for the purpose of performing a contract which it expected to get, but which was never signed, such expenditures were not made upon the faith of any agreement with the United States. In absence of a provision in the contract providing for the amortization of special facilities, it must be presumed that the contractor was equipped with the facilities necessary to enable it to perform the contract, and if expenditures are made for facilities and the contract is suspended before completion, the contractor is not entitled to reimbursement for such expenditures. Held, there was no agreement and claimant is not entitled to any reimbursement.

Capt. Taylor writing the opinion of the Board.

FINDINGS OF FACT.

The Appeal Section finds the following to be the facts:

1. This claim is before the Appeal Section, formerly the Board of Contract Adjustment, on appeal from the action of the Claims Board, Office Director of Purchase, denying claimant any relief. Statement of claim, Form A, has been filed under Purchase, Storage, and Traffic Division, Supply Circular No. 17, 1919, for \$936.10, by reason of an agreement alleged to have been entered into between claimant and the United States.

2. Between October 4 and 23, 1919, claimant company received several telegrams and letters from Mr. S. L. Rariden, Washington representative of the Indianapolis Chamber of Commerce, advising claimant that it had been recommended by the Hardware and Metals Division, Office of the Quartermaster General, for a contract for 3,375 No. 2 Army field ranges, and that as soon as the contract had been approved by the board of review it would be forwarded to claimant.

Contract No. H. C.-827-J., dated October 16, 1918, was approved by the Board of Review October 22, 1918, and was received by claim-

ant October 26, 1918. By the terms of this contract (Q. M. C. Form No. 103 C with Schedule A attached) claimant was to furnish and deliver to the United States "3,375 Army Ranges No. 2 complete with boiling plate," at \$11.47 each, "delivery to commence November 1, 1918; 500 per week; entire contract to be completed by December 20, 1918."

3. Immediately upon receipt of the contracts on October 26, claimant returned them unsigned, requesting that (1) the term "Army Field Ranges No. 2 complete with boiling plate" be changed to read "Army Field Range No. 2 with boiling plates but without smokestacks or any other equipment," stating that this was in accordance with claimant's understanding; (2) that the delivery date be changed to read, "Delivery to commence two weeks after the receipt of needed material," stating that this was in accordance with its tender, and also stating—

"We, of course, could not place definite orders until we received your contract, but we have been securing promises of delivery, and the best promise we have received on the sheet iron is from the American Sheet and Tin Plate Co., who stated that if we can secure the automatic classification of A-5 they could make shipment within from four to six weeks."

The Hardware and Metals Division returned the contracts to claimant with instructions to sign them as they were, but advised that claimant's letter had been referred to the purchasing officer. Claimant then changed the reading of the contracts with lead pencil, signed, and returned them. The lead pencil changes were erased and the contracts were returned to claimant by the Hardware and Metals Division with instructions to sign them as they were. This letter did not reach claimant until after the signing of the armistice. Claimant then communicated with the Jeffersonville Depot Quartermaster, who replied by wire, "Go slow on further expenditures," and shortly thereafter requested that all operations under the contract be suspended. The contracts were never signed by claimant.

4. It appears that upon receipt of advice from Mr. Rariden that it was certain to get a contract for field ranges claimant made arrangements to purchase the needed material, with the understanding, however, that none was to be shipped until claimant so advised by wire. Therefore claimant suffered no loss because of cancellation of its commitments. Claimant did make some rearrangements and adjustments in its factory, including the roofing of a courtway, at a total cost of \$1,543.70, all of which was completed about the time the armistice was signed. The Zone Board of Review at Jeffersonville undertook to negotiate a settlement of the supposed contract, and on December 20, 1918, claimant in conference with that Board agreed to settle contract No. H. C.-827-J "on the basis of payment of \$936.10,

covering difference in cost of building erected especially for its work and its fair value to us, the cost of the building being \$1,543.70." The Jeffersonville Board of Review recommended settlement on this basis, but the Claims Board, Office Director of Purchase, held that there was no agreement between claimant and the United States.

DECISION.

1. It can not be said that an informal agreement was reached between claimant and the United States. There was no meeting of the minds on certain material terms of the contract. The Appeal Section therefore holds that no agreement was entered into between claimant company and any representative of the Secretary of War such as is contemplated by the act of March 2, 1919.

2. But even if it had been found that an agreement had been entered into between claimant and the United States no relief could be granted claimant. This claim is for expenditures made for special facilities provided by the claimant for the purpose of filling a contract which it had every expectation of receiving from the United States, but this contract contained no provision providing for the amortization of special facilities. In the absence of a provision in the contract providing for the amortization of special facilities, it must be presumed that the contractor was equipped with the facilities necessary to enable it to perform the contract, and if expenditures are made for facilities and the contract is suspended before completion, the contractor is not entitled to reimbursement for such expenditures. If, at the request of the Government, a contract has been suspended before completion, reimbursement for facilities will be made only when they were specially provided and paid for by the contractor for the performance of the contract, and the necessity therefor was contemplated at the time the bargain was made and the cost thereof was included in the price to be paid.

3. For the reasons stated, therefore, the action of the Claims Board, Office Director of Purchase, is hereby affirmed, and the relief asked for is hereby denied.

DISPOSITION.

The Appeal Section will enter an order denying relief.

Lieut. Col. McKeeby and Lieut. Hendon concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

NOVEMBER 2, 1920.

Case No. 1598.

***In re* CLAIM OF GARFORD MOTOR TRUCK CO.**

This claim was decided by the Board of Contract Adjustment on April 22, 1920.

Relief was denied the claimant in so far as any contract existed between the claimant and the United States Government. The Board further held that the settlement contract entered into between the United States and the Garford Motor Truck Co. was void as having been entered into without consideration and without the authority of the Secretary of War, and without warrant in law.

The Secretary of War, through his advisers, sets aside so much of the decision of the Board of Contract Adjustment as finds the settlement contract of May 14, 1919, void and illegal and directs that the said settlement contract be affirmed without prejudice, however, to the right of the Garford Motor Co. to open the same in a proper case; and that the said decision of the Board of Contract Adjustment be affirmed in so far as it denies all relief to the Teetor-Hartley Motor Co. either as a direct claimant against the Government or as a subcontractor under the Wisconsin Motor Co., and the Garford Motor Truck Co. (For statement of facts and decision, see Decision of the Board of Contract Adjustment under date of Apr. 22, 1920.)

Maj. Farr writing the opinion of the Board.

ON RECONSIDERATION.

1. This case has been before the Board of Contract Adjustment on several occasions, the last decision of the said Board being dated April 22, 1920. In order that this decision may clearly set forth all the facts in the case, it is deemed wise to quote certain portions of the decision of the said Board of April 22, 1920. This decision first sets out the origin and nature of the claim in the following language:

"1. On May 28, 1919, the Teetor-Hartley Motor Co. filed its claim with this Board, Form B, setting up an alleged oral agreement with Major Arthur B. Browne, Motor Transport Service, whereby Major Browne is alleged to have agreed with the claimant in substance that if it would undertake the obligations of a subcontractor with reference to the production of certain motors for trucks that the United States would take such action as would protect it to the same extent as if it were a principal contractor. It alleged a loss to it of \$244,105.80 by reason of its acceptance and action upon the said agreement or offer of Major Browne.

"2. On June 4, 1919, this Board entered its decision denying the claimant relief on the ground that there was 'no evidence to justify

a finding that this claimant had any contractual relations with the United States which would permit it filing a claim directly or under which there would accrue any of the rights claimed by it.' The Decision suggested that if the Teetor-Hartley Co. had a valid claim the appropriate procedure would be to arrange with the Wisconsin Motor Co., to which the claimant was under contract, to submit its claim to the Garford Motor Truck Co., the contractor with the United States.

"3. It appears, however, that at the time the said Decision was entered the Garford Motor Truck Co. had already entered into what purports to be a settlement contract with the United States determining the amount due the Garford Company from the United States in full settlement of all obligations of the United States arising out of the Garford Company's contracts with the United States referred to in said Decision. (The duly executed contract of Sept. 26, 1918, and the informal supplement thereto of October 22, 1918.)

"4. On June 30, 1919, the Garford Motor Truck Co. filed a statement of claim on behalf of the Teetor-Hartley Company, which statement of claim set out a copy of the contract of September 26, 1918, between the Garford Company and the United States for the delivery of 1,000 2-ton trucks and parts and copies of the correspondence (Oct. 22, 1918, and thereafter), constituting a supplemental agreement increasing the number of trucks to 4,000; also copies of cancellation agreement dated May 14, 1919, whereby the Garford Company surrendered all claims for compensation growing out of the agreement for the construction of 3,000 trucks in consideration of the payment to it of \$30,233.30. The 1,000 2-ton trucks were delivered by the Garford Company and paid for by the United States.

"5. On July 24, 1919, this Board entered its Decision on the said application, which requested the reopening of this settlement agreement with a view of making allowances to the Teetor-Hartley Company. The Decision held (paragraph 5) that the Claims Board, Office of Director of Purchase, is unauthorized to reopen the case of the Garford Motor Truck Co., in view of the fact that such company signed and executed a termination agreement wherein it waived and released all claims against the United States arising out of said original contract.

"6. On or about August 13, 1919, the claimant filed a petition for rehearing wherein it offered to submit certain additional evidence not before this Board at either of the prior determinations of the claim. The matter was submitted to the Committee on Rehearings, which directed that the case be reheard.

"7. Accordingly, on February 4, February 24, and March 17, 1920, further evidence was adduced on the part of the claimant and of the United States."

2. The decision of the Board, being brief, is also quoted:

"1. The claimant alleges that upon the faith of assurances of Major Arthur B. Browne on or about August 20, 1918, that if it undertook the production of Wisconsin UU motors it would be safeguarded to the same extent as if it were a direct contractor with the United States, it proceeded to put itself in position to undertake such production and thereby incurred substantial expenses for facilities and otherwise, and that Major Browne's action and its own in the premises with

other circumstances constitutes an agreement, express or implied, within the Act of March 2, 1919. The proof offered to support this allegation does not amount to proof of an agreement, express or implied, within the Act of March 2, 1919. It does not appear to have been the intention of Major Browne to enter into any agreement with the claimant. The evidence tends to show that his declarations to the claimant's president were rather in the nature of information than in the nature of an agreement. They amounted to a declaration on the part of Major Browne that in his judgment the United States would require a very large number of Wisconsin motors of the type stated, and that in his judgment if the claimant undertook such production it would be safeguarded, etc. The claimant's president knew that Major Browne was giving him the best information he had on the subject of the needs of the United States and the probable duration of this need. The number of such motors needed as determined by the estimates of the Motors Division was made available to the claimant's president as data on which he could base his decision for action in the matter. Underlying the conversation was the knowledge on the part of both parties that hostilities might cease at any time, and that with the cessation of hostilities the need of the United States would cease, or at least be reduced.

"2. The conversation with Major Browne, the incident principally relied upon, seems with regard to price, quantities and delivery to be of too vague a nature to amount to a positive agreement on the part of Major Browne to bind the United States or to express the matter otherwise the vagueness of the provisions of the alleged agreement tends to show that it was not Major Browne's intention to enter into contractual obligations with the claimant. Furthermore, it was within the power of that officer and it was his duty, if it had been his intention to contract and his understanding that an agreement had been entered into, to recommend to his superiors the execution of a contract. This was not done and from this omission with the other facts and circumstances in the case the inference must be drawn that such was not his intention or understanding.

"3. In so far, therefore, as this claim rests upon an agreement, express or implied, growing out of the conversation with Major Browne and the other circumstances shown, it must be denied.

"4. It appears, nevertheless, that the agreement with the Garford Company of October 22, 1918, for the construction of 3,000 additional trucks was an agreement within the Act of March 2, 1919. That Act provides that such agreements shall be adjusted, paid or discharged upon a fair and equitable basis as determined by the Secretary of War. The Secretary of War has appointed the War Department Claims Board as the agency to determine what a fair and just basis may be in such case. That Board by Supply Circular No. 17, has directed the manner in which such basis shall be determined and the appropriate amounts paid in discharge of the agreement found. That circular requires the execution of Certificate C, the annexing of a document embodying the agreement and the payment by award of the amount found to be due.

"5. It appears from the record herein that no Certificate C has ever been executed with reference to the agreement of October 22, 1918, for the delivery of the 3,000 additional Garford trucks nor has any document embodying the said agreement been determined upon by

the appropriate authority. This settlement contract purporting to determine the obligations of the parties arising out of the said agreement of October 22, 1918, and providing for the payment of a certain amount to the Garford Company to settle the obligations of the United States therein is without consideration and void as having been entered into without the authority of the Secretary of War and without warrant in law. If payment has been made thereon such payment was illegal and should be refunded except to the extent it may be found to be due the Garford Company by the proceedings directed below."

3. Claimant was forwarded a certified copy of the Findings of Fact and Decision of the Board of Contract Adjustment under date of April 22, 1920, and on the 10th day of May, 1920, noted an appeal to the Secretary of War. Under date of May 12, 1920, the decision and the file were forwarded by the Board of Contract Adjustment to the War Department Claims Board for transmission to the Secretary of War, and in turn handed to the Special Advisers to the Secretary of War, the material parts of the opinion of the said advisers being herewith quoted:

"The first question presented on this appeal is whether an adjustment of an informal contract under the Dent Act is wholly void if made by a cancellation agreement instead of by the usual procedure of certificate and award as prescribed by Supply Circular 17. The facts were that a formal contract (No. 533) for 1,000 trucks had been made between the Garford Company and the United States under date of September 26, 1918. On October 22, 1918, an additional order was given for 3,000 more trucks of the same make, and a supplemental amendatory contract was prepared for the purpose of changing the original amount of 1,000 to 4,000, but this supplemental contract was never actually executed. After the Armistice the order for the additional 3,000 trucks was canceled. Contract No. 533 contained a termination clause, and in accordance with its terms a formal cancellation agreement was executed between the Government and the Garford Company under date of May 14, 1919, providing for the payment to the company of \$30,320.23 and settling all claims, both under the original contract and the supplemental order. It appears that no figures were included by the Garford Company on account of the Teetor-Hartley subcontract. A letter from the former chief of the Claim Settlement Section of the Motors and Vehicles Division states as the reason for adjusting the entire matter by a cancellation agreement instead of under Supply Circular 17 that the records of the Contract Section showed that the supplemental agreement had been completely executed and that the mistake was not discovered until later.

"The settlement contract recites in the usual language that it is made under direction of the Secretary of War, and bears at the end the approval of the Board of Review, Office of Motors and Vehicles Division. The papers state that it was also approved May 16, 1919, by the Claims Board, Office of Director of Purchase, and May 17, 1919, by Col. C. A. McKenney on behalf of the War Department Claims Board. It does not appear whether Colonel McKenney was

acting by his authority as a bureau member of the Board or under specific authority conferred upon him in connection with the individual case. The amount of money paid in the settlement is the same as it would have been under Supply Circular 17, and from that point of view the mistake made no difference in this particular case. The suggestion in the papers that settlement by supplemental contract has resulted in an overpayment of about \$1,800, representing an allowance of ten per cent of the cost of raw materials, commitments, and other items not permissible under Supply Circular 17, overlooks the fact that the order for 3,000 motors, upon which the claim is founded, was in fact an amendment of the prior formal contract for 1,000 motors, changing it only in respect to the number, and consequently leaving in full effect the provisions of the termination clause, which required the payment of ten per cent on everything except special facilities.

"The authority of the Secretary of War to make settlements under the Dent Act was by G. O. 33 and G. O. 40 conferred upon the War Department Claims Board, and that Board thereupon duly prescribed certain procedure, as set forth in Supply Circular 17. Near the beginning of this circular the following language is printed in italics:

"*'Attention is called to the fact that the Act does not authorize the execution of contracts which have not heretofore been properly executed. The Bureaus shall not execute contracts with respect to agreements covered by the Act, but shall proceed in the manner hereinafter provided.'*

"It does not follow, however, that a contract which has been executed in disregard of these instructions and has been fulfilled by payment must necessarily now be treated as void. Nothing in the Dent Act expressly requires the adjustment of informal contracts to take the form of a technical award. The term "award" is found in Sections 2 and 4, and also in one of the provisos in Section 1. But the authority given to the Secretary of War is to adjust, pay, or discharge upon a fair and equitable basis, and we think it would be entirely against the spirit of the act to import into it by construction any requirement to follow a special technical procedure. The merits and amount of the claim appear to have been thoroughly investigated and clearly there would be nothing to be gained by annulment of the proceedings, and substitution of a new process leading to the same result. Such a waste of time, on the other hand, should clearly be avoided if possible. Full jurisdiction under the Dent Act being given to the Secretary of War, his power to adjust must include authority to ratify, if necessary, an adjustment already made. Therefore, even if the cancellation contract of May 14, 1919, with the Garford Company might have been considered void because of deviation from instructions given in the Supply Circular, we nevertheless think that the desirable course at the present stage would be to ratify it rather than to order new proceedings in accordance with the decision of the Board of Contract Adjustment.

"This disposes only of the appeal of the Garford Company from that part of the decision of the Board of Contract Adjustment which held the cancellation agreement void. There remains to be considered the appeal of the Teetor-Hartley Company, both as direct

claimant in case No. 361, and as a subcontractor under the Garford Company in case No. 1598. At this point it should be remarked that the Teetor-Hartley Company was not an immediate subcontractor but a sub-subcontractor, the Wisconsin Motor Company intervening between the Teetor-Hartley Company and the Garford Company. The situation was that the Garford Company having a contract with the Government for completed trucks, made a subcontract with the Wisconsin Company for the motors, and the latter Company under the circumstances detailed hereafter turned over this part of the contract to the Teetor-Hartley Company. The latter Company claims to have suffered through the cancellation of the 3,000 car order, and has presented its claim both as a direct liability of the Government and as a claim through the prime contractor.

"We have examined the record with great care to avoid injustice to the appellant, but are unable to find sufficient foundation for the claim in any aspect. Resolving all disputed questions of fact in favor of the claimant, the evidence shows that in April or May, 1918, the claimant, a manufacturer of motors, desired to get a contract with the Government, but the officials in Washington refused to make a direct contract for anything but completed trucks, except in certain classes quite distinct from those involved here. The claimant was urged to get a subcontract from the Wisconsin Motor Company to manufacture the so-called UU Motors, which were being used in the Garford trucks, and after some demurring and expression of fears concerning putting itself in the hands of a rival, the claimant about July 1st made some sort of arrangement with the Wisconsin Motor Company under which the latter was to turn over all its orders for UU motors, and agreed to furnish the claimant with certain jigs and tools on hand, which were useful for this purpose. There is also evidence that the price of the motors was to be from \$315 to \$328.50, and that upon termination the Wisconsin Company would allow the Teetor-Hartley Company for all material returned the same value at which it was taken over, provided it passed inspection. Nothing definite was said about the number of motors to be made, although there was talk at first of 2,000, and some expectation of much larger amounts. This arrangement was entirely verbal. Shortly afterwards, on July 20, an order was given the claimant by the Wisconsin Company for 500 UU motors. The Wisconsin Company, however, failed to furnish the amount of jigs and tools which the claimant expected, and in August the claimant's president discussed the situation with Major Browne, representing the Government, by whom he was further urged to continue his relations with the Wisconsin Company in spite of his repeated expressions of dissatisfaction and fear. Following the conference with Major Browne, the claimant prepared itself for manufacturing Wisconsin UU motors in large quantities. It added to its plant, enlarged its force, installed new machinery, and acquired materials. The exact dates and amounts do not appear because the claim has not been audited, but the total amount expended after allowing for salvage appears to be about \$230,000. No further orders came from the Wisconsin Company, however, until October 19, when an order was received for 700 motors, making 1,200 in all. These were the only formal written orders Teetor-Hartley Company ever received. On either October 22 or 23, however, Mr. Barrows, the president of the claimant, was with Mr.

John, the president of the Wisconsin Company, when the latter received a message from the Garford Company, stating that the Government wanted 3,000 more UU motors. Mr. John repeated this conversation to Mr. Barrows, and told him that he expected the Teetor-Hartley Company to turn out these motors. Mr. John apparently did not consider this the giving of an order, but Mr. Barrows claims it was. No action appears to have been taken upon it by anybody, however, and the 1,200 motors theretofore ordered were not completely delivered until the following April. The formal written order received by the Wisconsin Company from the Garford Company was expressly terminable in the event of cancellation of the Garford Company's Government contracts, and a copy of this order appeared without explanation in the records of the Teetor-Hartley Company. The several companies were conversant with their mutual relations to the manufacture of these motors. On November 15th the Garford Company by telegram canceled its order for 3,000 motors with the Wisconsin Company, and on the same day and the day following a series of telegrams were exchanged between the Wisconsin Company and the Teetor-Hartley Company announcing the cancellation of the Government order, confirming existing orders for 1,000 or 1,200, and declaring that on account of the Government cancellation the Wisconsin Company would not place an additional order of 3,000. The Teetor-Hartley Company made no protest or objection of any kind to this disposition of the order for 3,000 motors, and it is important to notice that the Teetor-Hartley Company has never made any claim against the Wisconsin Company for loss incurred through cancellation of the contract, nor does either the Wisconsin Company or the Garford Company admit any liability arising out of this cancellation.

"The chief reliance of the claimant appears to be placed on certain statements made to its president by the officers in Washington, and later by Major Browne, in connection with their refusal to make a direct contract for motors.

* * * * *

"The indefinite assertion that the claimant would be protected just as if it had a direct contract with the Government will not support the theory that in consideration of the claimant's undertaking to build Wisconsin Motors and equipping itself for that purpose, the Government guaranteed it sufficient orders to absorb its expenses. If there was any undertaking by the Government at all, it was at most one to see that the Wisconsin Company treated the claimant in accordance with its obligations. It was no more than a sort of guaranty that the Teetor-Hartley Company would get whatever might be due it from the Wisconsin Company. But this guaranty has not been violated. There is no proof of any obligation by the Wisconsin Company that has not been lived up to, nor is there any way in which the Teetor-Hartley Company as a subcontractor can expect payment out of Government funds unless its claim can be recognized as a valid commitment of the prime contractor.

"Thus in either aspect of the case it would have been necessary to prove that the Wisconsin Company is liable to the Teetor-Hartley Company on the subject matter of this claim, but such proof is en-

tirely lacking. Accordingly, we can not find that the Board of Contract Adjustment committed any error in denying the claim of the Teetor-Hartley Company.

"It is possible that the Teetor-Hartley Company misunderstood the language of the first decision of the Board of Contract Adjustment, suggesting that any claim must be presented through the Garford Company. The Teetor-Hartley Company has acted as though this were merely a matter of form. Neither it nor the Garford Company should be barred on this account from a reopening of the Garford settlement in case sufficient grounds therefor appear in the future. Such grounds, of course, must include not only proof that an item of real liability has been omitted but that the omission occurred under circumstances giving the Secretary of War jurisdiction to surrender the benefit of the duly executed release.

"It is accordingly recommended that so much of the decision of the Board of Contract Adjustment as finds the settlement contract of May 14, 1919, void and illegal, be reversed, and said settlement contract be confirmed, without prejudice, however, to the right of the Garford Motor Truck Company to petition to reopen the same in a proper case; and it is further recommended that the said decision of the Board of Contract Adjustment be affirmed in so far as it denies all relief to the Teetor-Hartley Company, either as a direct claimant against the Government or as a subcontractor under the Wisconsin Motor Company and the Garford Motor Truck Company."

4. Under date of October 9, 1920, the Secretary of War rendered the following decision:

"Upon consideration of the record in these matters, the accompanying recommendation of the Special Advisers is hereby approved, and it is ordered that the action heretofore taken be modified as therein recommended."

5. By direction of the Secretary of War as set forth in the foregoing order, so much of the decision of the Board of Contract Adjustment as finds the settlement contract of May 14, 1920, void and illegal be, and the same is hereby, reversed, set aside, and annulled, and the said settlement contract is confirmed, without prejudice, however, to the right of the Garford Motor Truck Co. to petition to reopen the same in a proper case; and the said decision of the Board of Contract Adjustment is affirmed in so far as it denies all relief to the Teetor-Hartley Co. either as a direct claimant against the Government or as a subcontractor under the Wisconsin Motor Co. and the Garford Motor Truck Co.

DISPOSITION.

A final order denying relief will issue.

Lieut. Col. McKeeby and Capt. Sheppard concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

NOVEMBER 2, 1920.

Case No. 2800.

***In re* CLAIM OF NEW YORK & PENNSYLVANIA RAILWAY CO.**

This claim was decided May 5, 1920, granting claimant full relief. On reconsideration of the decision at request of Special Member of War Department Claims Board assigned to Air Service, a second hearing was held by Board of Contract Adjustment, and on June 29, 1920, a decision was rendered by that Board, granting claimant relief in part. On appeal to the Secretary of War both of the above decisions were ordered vacated, and the Appeal Section, War Department Claims Board, directed to enter an order denying claimant relief.

Maj. Blackburn writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. On May 5, 1920, the War Department Board of Contract Adjustment rendered a decision in this case, granting claimant full relief. Reconsideration of this decision was requested by the Special Member of the War Department Claims Board assigned to the Air Service. A second hearing was conducted before the Board of Contract Adjustment on June 17, 1920, and on June 29, 1920, a decision was rendered by the Board granting claimant relief in part, holding that claimant was entitled to reimbursement of such losses as it suffered in continuing the operation of the railroad.

2. An appeal from this decision to the Secretary of War was taken by claimant, and the case has been returned to the Appeal Section, War Department Claims Board, with written instructions from the Secretary of War. In the recommendation of October 15, 1920, of Mr. R. C. Goodale, Special Adviser to the Secretary of War, it is stated:

"Under the elementary principle of the law of public service corporations claimant had no right to discontinue service until it had been duly authorized so to do by the proper authorities of the state from which it had received its charter, or by a court of competent jurisdiction. Upon the claimant company making application for leave to discontinue the operation of its road, the United States, like any other party in interest, had the right to appear in opposition to the granting of claimant's petition, and it would seem that a showing of public necessity for the use of the road for the transportation

of materials for the production of munitions would properly have a bearing upon the action to be taken upon such application."

Mr. Goodale concludes by recommending that the record be returned to the War Department Claims Board with instructions to vacate both the decisions heretofore rendered, and to enter an order denying claimant relief. On October 16, 1920, the Secretary of War entered the following decision in the case:

"Upon consideration of the record in this matter it is directed that the two decisions heretofore rendered by the Board of Contract Adjustment be vacated, and that an order be entered denying claimant relief, in accordance with the accompanying recommendation."

DECISION.

The decision of the Secretary of War is final in this matter. The Appeal Section, War Department Claims Board, therefore holds that claimant is not entitled to relief.

DISPOSITION.

A final order denying relief will be entered.

Lieut. Col. McKeeby and Mr. Marcum concurring for the appeal section; Col. Morrow concurring for the War Department Claims Board.

NOVEMBER 2, 1920.

Case No. 2989.

***In re* CLAIM OF WINCHESTER REPEATING ARMS CO.**

1. **FACILITIES.**—A manufacturer is not entitled to reimbursement for the expense of installing special facilities even with the knowledge and consent of officers of the Ordnance Section in the absence of an agreement, express or implied, that the Government will reimburse claimant for such expense.
2. **CLAIM AND DECISION.**—Claim for \$9,888.99 under the act of March 2, 1919, for lens-grinding facilities. Held, claimant not entitled to recover.

Lieut. Col. Smith writing the opinion of the Board.

STATEMENT OF FACTS.

1. The items of this claim were originally a part of a claim under contract No. P14134-999C duly presented by claimant prior to June 30, 1919. However, at the suggestion of the Ordnance Section, the items involved in this claim were withdrawn and made the basis of this claim, which was filed in July, 1920, with this Board as a Class B claim under the act of March 2, 1919. The claim is for \$9,888.99 for labor and material in experimenting on and developing equipment for lens grinding.

2. In the summer of 1917 a representative of claimant approached officers of the Small Arms Section, Ordnance Department, relative to the probable demands of the Government for telescopic sights for rifles, and was advised that there was a probability of such demand. Claimant made some experiments with reference to the development of such a sight, and on October 22, 1917, Capt. Lee O. Wright, of the Small Arms Section, Ordnance Department, advised claimant by letter of that date that the Ordnance Department was considering having a telescopic musket sight made, and requested claimant to advise whether it was possible to go ahead with the work of developing such a sight, the Ordnance Department to pay for the "necessary tools, labor, etc., unless a sufficient number of sights are ordered to enable you (claimant) to distribute the preliminary expenses incurred over various orders."

3. Pursuant to the request contained in that letter claimant advised the Ordnance Department that it would proceed with the development of a telescopic sight. Claimant did so, and eventually a satisfactory sight was developed, and a contract dated August

24, 1918 (P14134-999C), entered into between claimant and the Government whereby claimant was to manufacture and deliver to the Government 32,000 telescopic musket sights at \$38 each (the total amount of the order being \$1,216,000), the Government to furnish, without cost to the contractor, the necessary optics for the sights. This contract was terminated before production was begun, and full settlement thereunder has heretofore been made.

4. Prior to August 8, 1918, and while the Government had under contemplation the letting of a contract for telescopic sights, it was realized both by the Government and claimant that difficulty would be experienced in obtaining at a reasonable price, if at all, the requisite optics for the telescopic sights. In the negotiations preceding the letting of the contract for the sights the Government considered the letting of the contract on the basis of claimant obtaining and furnishing the necessary optics and also on the alternative basis of the optics being furnished by the Government. During the period of negotiation three different methods were being pursued with reference to finding a source of supply for the necessary optics; claimant was endeavoring to locate a source of supply; the Government was doing likewise, and claimant, having installed lens-grinding machinery, was experimenting in the grinding of lenses.

5. Claimant does not contend that there was any express agreement with any Government officer or agent that the Government would reimburse claimant for the expense incurred by it in installing the lens-grinding machinery, and there is no evidence of such an agreement.

6. In all negotiations with reference to the telescopic sights claimant was represented by its vice president, Mr. Henry Brewer, who testified as a witness at the hearing. The substance of material portions of his testimony is as follows: About May 15, 1918, and some four days after the department had wired claimant that its telescopic sight had been adopted and that orders would be placed with claimant for sights, claimant reported to the Ordnance Department the poor progress it had made in developing a source of supply for telescopic lenses and stated that claimant would be able to make a bid on the telescopic sights as soon as a satisfactory source of supply for lenses had been established, and if the department so desired claimant would start to build up a lens-grinding shop within its own plant. The department expressed itself in favor of such an undertaking "as a protective measure in the event of there being an insufficient source of supply." Claimant immediately started to develop a lens-grinding shop and also continued its efforts to obtain lenses from lens manufacturers.

"At that time it was not known which of these three methods would prove most successful, and it was thought best to continue our efforts along all three lines owing to the emergency requirements of the case." (R., p. 15.)

Mr. Brewer discussed the matter with Lieut. Maurice P. Anderson, an officer in the Artillery Section, who knew that claimant was going to install the lens-grinding machinery. Lieut. Anderson said:

"We would like you to go ahead. * * * Sure; go ahead. I wish you would." (R., p. 27.)

The following question was asked Witness Brewer by the trial attorney:

"You told him you were going to do it on your own initiative?" (R., p. 26.)

To it Mr. Brewer replied:

"Most of this was on our own initiative. If they even had any desire, we went ahead and did it." (R., p. 26.)

Mr. Brewer further testified:

"I talked with Anderson, and said, 'We can probably build a plant to make some, but can not make so very many of them.' We told him we undoubtedly could make some. They were extremely anxious to get those over as soon as they could, and we told him that we could make a few of them for the help in the early work, to get them started. That was discussed with Anderson, and he said, 'Why, yes; I would be glad to have you do it. Go ahead with it.' It was in a very informal way. And we started on it." (R., p. 28.)

Mr. Brewer admitted that the authorization of October 22, 1917, was not intended to include authority to install lens-grinding facilities, but applied only to the development of the telescopic sight itself. (R., p. 6.) He further testified that the lens-grinding machinery for which claim is made had no value to claimant and that the lens-grinding plant had been dismantled.

Before installing the lens-grinding facilities, claimant made a thorough investigation of the lens situation and became convinced that it could build up a lens-grinding shop in its own plant and produce lenses at a price lower than any price which it had been able to obtain.

In June, 1918, a representative of the Optical Glass and Instrument Section reviewed with claimant the lens specifications and inquired as to progress being made with lens grinding and as to what deliveries of lenses claimant would be able to make. On August 8, 1918, claimant was advised by the Ordnance Department that it would receive a contract for 32,000 telescopic musket sights, lenses to be furnished by the Government. The contract thus referred to is the contract of August 24, 1918, heretofore mentioned. Mr. Brewer also testified:

"Unfortunately we did not insist on a formal authorization to back us up in this, because we expected to get our remuneration in the manufacture of the telescope." (R., p. 32.)

7. Mr. K. I. Tredwell testified on behalf of claimant substantially as follows: Up to the last part of the negotiations for the telescopic sights claimant was negotiating to obtain the optics at the least possible cost and it appeared most economical that claimant should manufacture them. Mr. Tredwell also testified:

"So, although there is no direct authorization to produce lenses there is an authorization in the other minutes there to go head with the telescope sights, which naturally infers every component part of them until August 8, when it was finally decided that the Government was to supply that component of lenses. Then we stopped on that." (R., p. 30.)

8. There is in the file an affidavit from Lieut. Anderson, in which he quotes the following from his war diary:

"Mr. Brewer, of the Winchester Repeating Arms Co., telephoned and stated that they now had some optical equipment and the nucleus for an optical shop, which they had worked up in the past few months, thinking that they might be forced to manufacture the optics for telescopic musket sights, Model 1918. Mr. Brewer further states that he would like to receive an order for a small amount of optics, possibly spare optics, so that work they had done would not be lost. He stated that as yet they had been unable to get their price below \$15 per set. I told him that \$15 was rather high, but that we understood that it would be more expensive to have them make them. I told him, further, that he should sharpen his pencil and get the price down as low as possible, and then talk to us, and that if there was any basis on which we could do business we would be glad to give them an order for whatever quantity they could handle."

DECISION.

1. There can be no allowance for facilities installed, although their installation was through laudable motives, unless a contract, either express or implied, to reimburse claimant is established. There is no express contract for the installation of the facilities made the basis of this claim. The testimony of Mr. Brewer, as to his conversations with Lieut. Anderson in connection with the other facts and circumstances in the case, is not sufficient to raise an implied agreement on the part of the Government to reimburse claimant. In fact, it is apparent from the entire record that the lens-grinding facilities were installed by claimant in anticipation of contracts for optics to be used in the telescopic sights, and it is evident that if the contract for the telescopic sights had gone to completion, although claimant was to furnish no lenses thereunder, that it was the intention of the claimant to absorb all of the experimental ex-

pense, as well as the expense of installing the lens-grinding facilities in the price that it was to receive from the Government for the telescopic sights. It is also apparent from the record that at the time the facilities were installed that they were installed by claimant in the exercise of its business judgment rather than because of any understanding or agreement with officers of the Ordnance Department.

2. It is therefore the opinion of the Board, from a consideration of the entire record, that no contract is established within the meaning of the act of March 2, 1919, and therefore that relief to claimant must be denied.

DISPOSITION.

1. Final order denying relief will be issued.

Lieut. Col. McKeeby and Capt. Frazer concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

NOVEMBER 4, 1920.

Cases Nos. 2670, 2671, and 2672.

***In re* CLAIM OF NASSAU SMELTING & REFINING WORKS.**

This claim was decided by the Board of Contract Adjustment under date of May 22, 1920, relief being granted, it being the opinion of the Board that the claimant should be paid at the rate of 8¾ cents per pound computed upon the maximum weight of the copper as shown by the respective drawings and not upon the actual weight of the bands finally produced. The standing committee of the War Department Claims Board disagreed with the finding of the Board of Contract Adjustment and from this finding of the War Department Claims Board, claimant noted an appeal to the Secretary of War. Under date of October 26, 1920, the Secretary of War reversed the finding of the Board of Contract Adjustment, his decision being that the claimant is only entitled to payment upon the actual weight of the bands delivered. (For statement of facts and decision see these decisions, Vol. V, p. 679.)

Maj. Farr writing the opinion of the Board.

ON RECONSIDERATION.

1. These cases were decided by the Board of Contract Adjustment under date of May 22, 1920 (recorded on p. 177, Vol. V, Decisions of this Board), and were, in part, favorable to the claimant.

2. The Board of Contract Adjustment under date of June 5, 1920, forwarded these claims, together with all supporting papers, to the Ordnance Claims Board. The decision of this Board then came up before a meeting of the standing committee of the War Department Claims Board, held July 16, 1920, at 11 a. m., room 2040, Munitions Building, which reached the following decision:

“These cases were presented by Mr. Van Fossan as involving a question heretofore presented in the New Jersey Tube cases, i. e., whether compensation for delivered articles should be on the basis of actual weight of articles delivered, or on basis of maximum drawing weight.

“It was the opinion of the committee that the action taken in the New Jersey Tube cases should govern these cases—that is, that contractor should be paid only on basis of actual weight of bands delivered.”

3. Claimant thereupon, on the 8th day of September, 1920, noted an appeal from the decision of the standing committee, War Department Claims Board, and the claims, together with all the supporting papers, were forwarded to the Secretary of War, who under date of

October 26, 1920, returned the said claims to this section with the following order :

“ Upon consideration of the record in these matters, it is directed that the decisions of the Board of Contract Adjustment in these three cases be reversed, and that orders be entered denying claimant relief.”

4. By direction of the Secretary of War, as set forth in the foregoing order, the decision rendered by this Board on the 22d day of May, 1920, in Cases Nos. 2670, 2671, and 2672 of the Nassau Smelting & Refining Works, New York City, is hereby set aside and vacated and all relief asked for by the claimant in its original petition and on appeal to the Secretary of War is denied.

DISPOSITION.

A final order denying relief will issue.

Lieut. Col. McKeeby and Capt. Sheppard concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

NOVEMBER 5, 1920.

Case No. 3023.

In re **CLAIM OF THE BUFFALO SHIRT CO.**

- 1. OFFER OF AWARD.**—Where this Board has heretofore rendered a decision directing that an award be made under the provisions of Supply Circular 111 and the Purchase Section omits to include in its award certain items properly allowable under the supply circular, the record will be returned to the Purchase Section with directions to make such allowances, although the amount thereof may be small.
- 2. AMENDMENT OF CLAIM.**—Where it is probable from a review of the record that claimant might be able to show that it was entitled to an additional award for items of excessive cost of articles delivered under a suspended contract, but the evidence contained in the record is not such as to enable this Board or the Purchase Section to segregate from the cost of manufacture items of excessive cost due to items for which the Government is not liable, claimant will be given an opportunity to file an amended statement and also will be given opportunity to present to the Purchase Section evidence in support thereof, and the record will be returned to the Purchase Section for appropriate action.
- 3. CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$5,104.98 for loss on contract for the manufacture of flannel shirts. Held, on appeal from award of Purchase Section that the Purchase Section has omitted certain items to which claimant is entitled and that the record should be returned to such section for appropriate action, and claimant should be given opportunity to file an amended statement and present to the Purchase Section evidence in support thereof.

Lieut. Col. Smith writing the opinion of the Board.

FINDINGS OF FACT AND DECISION.

1. This claim is before this Board on appeal by the claimant from an offer of award by the Purchase Section under a decision rendered by the Board of Contract Adjustment dated April 16, 1920, Vol. IV, Dec. B. C. A., p. 1258), directing settlement under the provisions of Supply Circular No. 111. Reference is made to the above decision for a statement of facts. The case is properly before the Appeal Section under a resolution adopted by the War Department Claims Board July 23, 1920.

2. Pursuant to the decision of the Board of Contract Adjustment, the Purchase Section made an offer of award in the sum of \$599.71. This amount was arrived at by the Purchase Section after Lieut. Col. William A. McAdam and Mr. H. W. Benke, a member of the

Purchase Section, had visited claimant's plant and conferred with claimant's president and Mr. Merritt Baker, claimant's attorney. Col. McAdam and Mr. Benke examined the vouchers and invoices presented by claimant and made a survey of the materials and special facilities involved in the claim and rendered a report to the Purchase Section. The offer of award, as shown by the letter to claimant from the Purchase Section, was arrived at in the following manner:

Article.	Cost.	Salvage.	Amount allowed.
Raw materials:			
Labels.....	\$16.06 (99 per cent allowance)...	\$0.16	\$15.90
Tickets.....	33.82 (99 per cent allowance)...	.33	33.49
Thread.....	17.60 (50 per cent allowance)...	8.80	8.80
Thread.....	480.37 (50 per cent allowance)...	245.68	245.69
Total (to be retained by contractor).....			303.68
Special facilities:			
Tables and labor.....	79.65 (50 per cent)	39.82	39.83
Sewing machines.....	575.00 (50 per cent).....	287.50	287.50
Parts for machines.....	39.00 (50 per cent).....	19.50	19.50
Total.....			346.83
Less amortization of 29.2 per cent for completed portion of contract.....			101.27
Total (to be retained by contractor).....			245.56
Other claims:			
Labor converting machines			40.47
Reconverting machines.....			10.00
Total net claim allowed.....			599.71

3. Claimant refused to accept the offer of award by the Purchase Section and appealed to this Board. The Board has reviewed its previous decision in the premises, and after a careful consideration of the entire record is unable from any facts now contained in the record to say that the Purchase Section was in error in making the offer of award in the amount that it did, except in the following particulars, which are of small moment, namely, (a) the failure to allow inward handling charges on the raw materials supplied by claimant and (b) interest at the rate of 6 per cent upon the amount of money invested in the raw materials during the period of investment. While these items would be small in amount, still the present record is sufficient to justify allowances thereon, even though small.

4. Upon a proper showing claimant would also be entitled to such portion of overhead as is directly applicable to the raw materials. There is not, however, in the present record any evidence upon which such an allowance might be predicated. However, if claimant should present facts which warrant such an allowance to the Purchase Section it should allow claimant such portion of its overhead as is directly applicable to the raw material.

5. It is possible under the second paragraph of subparagraph (5) of paragraph 3, Supply Circular 111, that claimant might, upon

proper showing, be entitled to an additional award covering the excess cost of manufacture in the earlier stages of the contract over the normal cost, exclusive of any cost attributable to an epidemic of influenza, a strike, or claimant's failure in the beginning to properly equip its plant with the requisite machinery. If claimant is able to segregate such items of excess cost from the cost of production of the articles delivered and will file an amended statement containing an item of excess cost of manufacture as herein suggested with a detailed statement of the facts on which such claim is based, the Purchase Section should make such an allowance, as it deems just and equitable in order to reimburse claimant for loss due to such excess cost, if claimant shall satisfy the Purchase Section by documentary or other evidence that claimant is entitled to such additional allowance.

Claimant has 10 days from this date within which to file with that Board an amended statement of claim as herein suggested.

DISPOSITION.

The record will be returned to the Purchase Station for appropriate action.

Lieut. Col. McKeeby and Capt. Frazer concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

NOVEMBER 5, 1920.

Case No. 3020.

In re **CLAIM OF WM. J. COCKE.**

- 1. FORMAL CONTRACT.**—In a formal contract containing a provision that “Nothing herein contained shall be deemed to impose any obligation on the part of the United States to guarantee the delivery of any specific quantity of garbage” there is no obligation on the part of the United States to maintain any troops at the camp referred to in said contract during the period covered by the contract.
- 2. BREACH.**—The Secretary of War has no jurisdiction to adjust a claim for unliquidated damages based on an alleged breach of a formal contract by the United States. Held, claimant entitled to no relief on the merits, and for lack of jurisdiction.

Capt. Taylor writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim is before the Appeal Section, War Department Claims Board, on appeal from a decision of the Claims Board, Office Director of Purchase, denying claimant any relief. The claim is for reimbursement in the sum of \$30,000 for losses alleged to have been sustained by the claimant because of the alleged breach by the United States of two formally executed contracts for the disposal of garbage at Camp Wadsworth, S. C., and Camp Green, N. C.

Claimant was offered an opportunity to appear in person and by attorney and present this claim before the Appeal Section, but waived that right, and has requested that the claim be decided on the record as presented.

2. While the correspondence would indicate that claimant is of the opinion that the claim comes within the purview of the act of March 2, 1919, relating to informal contracts, there is no allegation that any informal agreement was ever entered into between claimant and any officer or agent of the Secretary of War. The claim is, therefore, considered as one based on a formally executed contract which has been presented under the provisions of G. O. 103, War Department, 1918. The question of whether or not the claim was properly presented prior to June 30, 1919, is, therefore, immaterial.

3. By the terms of a contract entered into between claimant and Lieut. D. N. Davison, Q. M. C., dated September 23, 1918, for the

disposal of garbage at Camp Wadsworth and a similar contract entered into between claimant and Maj. A. B. Kaempfer, Q. M. C., dated July 1, 1918, for the disposal of garbage at Camp Green claimant agreed to purchase certain classes of garbage at these camps at the prices per hundredweight set out in the contracts from the dates of the respective contracts to June 30, 1919.

Claimant alleges that in reliance upon said contracts and in anticipation of receiving an uninterrupted supply of garbage up to June 30, 1919, he made great expenditures in preparing to feed a large number of hogs, viz., leased land, built hog lots and platforms on which to feed the hogs, and also purchased a large number of hogs, some of which were in transit to the camps when the order to mobilize the men at these camps was canceled, and that when the hogs reached the camps there was not sufficient garbage to feed them, and that consequently it became necessary to purchase feed for them, by reason of all of which claimant sustained great losses. Claimant estimates the total loss sustained by him, by reason of the failure of the Government to keep until June 30, 1919, the number of troops at these camps which he anticipated would be kept there, at \$15,000 at each camp.

Paragraph 15 of each contract is identical and is as follows:

"15. Nothing herein contained shall be deemed to impose any obligation on the part of the United States to guarantee the delivery of any specific quantity of garbage."

Claimant also alleges that the camp authorities failed to collect the garbage at a designated point as required by the terms of the contract, and also alleges that some of the garbage was turned over to other parties without claimant's knowledge or consent.

Paragraph 6 of each contract is identical and is as follows:

"6. Garbage hereby sold will be collected and delivered by the United States at a transfer point or points selected by the Commanding Officer of the camp, cantonment, army post or station. If required for sanitary reasons, the Purchaser will provide such a transfer point for garbage hereby sold at a place outside the limits of camp, cantonment, army post or station to be selected by said Commanding Officer."

DECISION.

1. There are two reasons why relief must be denied on this claim, viz., (1) on the merits; (2) because the Secretary of War has no jurisdiction.

(1) Relief must be denied on the merits because paragraph 15 of the contracts imposed no obligation upon the United States to guarantee the delivery of any specific quantity of garbage. Hence there was no obligation to maintain any troops at the camps until

June 30, 1919. Claimant entered into these contracts with full knowledge of this provision. The fact that he was informed of the expected arrival of a certain number of troops at a certain time and was told to have enough hogs at the camps to consume the garbage did not create an obligation on the part of the United States to keep the troops there until the hogs had been fattened and marketed or until June 30, 1919.

(2) If we accept claimant's contention as to his rights under the contracts, there has been a breach thereof by the United States. The claim is for unliquidated damages resulting from that alleged breach. If the United States breached the contracts as contended by claimant the contract is no longer in existence; it was terminated by the breach. It has been repeatedly held that the head of an executive department of the Government has no authority to settle a claim for unliquidated damages based on a contract which has been terminated by breach.

McKee v. U. S., 12 Ct. Cls., 556.

Power v. U. S., 18th Ct. Cls., 263, 275.

Wm. Cramp & Sons v. U. S., 216, U. S. 494.

Such claims should be presented to a court of competent jurisdiction.

2. For the reasons stated, therefore, the decision of the Claims Board, Office Director of Purchase, is hereby affirmed and the relief asked for is hereby denied.

DISPOSITION.

The Appeal Section will enter a formal order denying relief.

Lieut. Col. McKeeby and Lieut. Hendon concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

NOVEMBER 5, 1920.

Case No. 3014.

In re **CLAIM OF E. I. DuPONT DE NEMOURS & CO.**

- 1. NATIONAL DEFENSE—WAR INDUSTRIES BOARD COMPULSORY ORDERS.**—Where the Director of Purchase, Storage and Traffic issues a compulsory order to claimant whereby the entire output of ketone produced in its factory is commandeered for the use of the Government at a price fixed by the Secretary of War, such order constitutes an agreement within the meaning of the act of March 2, 1919, obligating the Government to take the commandeered product at the fixed price and the title to such product vested in the United States at the time of its production.
- 2. CLAIM AND DECISION.**—Claim for \$4,998 under the act of March 2, 1919, for the fixed price of ketone manufactured by claimant. Held, an agreement within the said act.

Lieut. Col. Smith writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is a Class B claim for \$4,998 and arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Supply Circular No. 17, 1919, by reason of an agreement alleged to have been entered into between the claimant and the United States.
2. In July, 1918, claimant purchased from William S. Gray & Co., New York, N. Y., one car of crude acetone oil, which oil was delivered to the claimant by permission of the War Industries Board.
3. In acetone oil is a chemical known as ketone. Ketone and acetone oil were under the exclusive control of the War Industries Board acting for the Government by virtue of a commandeering order dated December 24, 1917, signed by the Secretary of War, by direction of the President.
4. In a letter signed by C. H. Conner, of the Wood Chemical Section, Raw Materials Division, War Industries Board, designated as a supplement to the commandeering order, it is stated that the Secretary of War had fixed the minimum price of ketone at 25½ cents per pound.
5. On June 14, 1918, the Director of Purchase, Storage, and Traffic issued order No. 326 B/C, which ratified the action of the War

Industries Board in placing with claimant an order for its entire output of certain chemicals, including ketone, prior to January 1, 1919, and designated C. H. Conner, of the Wood Chemical Section, to handle production under the order. This order has so often been referred to in previous decisions of this Board that it is deemed unnecessary to set it out here.

The claimant received a letter of instructions from Mr. C. H. Conner of the Wood Chemical Section, War Industries Board, dated August 3, 1918, signed by Mr. A. H. Smith, in part, as follows:

"The ketone content of this acetone oil is to be fractionated by you and held subject to the directions of the undersigned. Advise as soon as the ethyl methyl ketone is ready for shipment, so shipping directions can be forwarded promptly."

The claimant complied with the above instructions, and on December 3, 1918, wrote to Wm. S. Gray & Co. the following information:

"We have been able to obtain 2,800 gallons by complying with the specifications. We have had no end of trouble getting this 2,800 gallons, which would pass the specifications, and it has been a very costly undertaking for us.

"I would be very glad to have you give me shipping instructions covering the sale of this material without delay, thereby obliging."

This letter was forwarded by Wm. S. Gray & Co. to War Industries Board, Wood Chemical Section, and Wm. S. Gray & Co. received reply from Wood Chemical Section, dated December 10, 1918, as follows:

"2. This refers to a quantity of 2,800 gallons of ketone which the foregoing company fractionated from a quantity of acetone oil, in accordance with our former instructions.

"3. The quantity of ketone is small, and we would suggest that you communicate with these people and ascertain if they can find any use for the solvent in the manufacture of any of their products. It will be in order for them to use it for such purpose."

There is no evidence that claimant ever received any shipping instructions. The claimant had this chemical on hand and had no use for the same in any of their manufactured products.

6. The claimant informally presented its claim to the Board of Appraisers by letter dated March 21, 1919. This is substantiated by affidavit of L. M. Bragdon, assistant purchasing agent of claimant company.

7. The record shows that the ketone is the property of the United States, that the minimum price to be paid was 25½ cents per pound, that being the original commandeered price. That the 2,800 gallons of ketone are now in the possession of claimant, stored at Parlin, N. J.

DECISION.

1. The facts are undisputed. C. H. Conner, Chief of the Wood Chemical Section, War Industries Board, was acting as the agent for and on behalf of the President and the Secretary of War. He was acting within the scope of his authority in directing that the ketone be fractionated from the acetone oil, released to claimant by Wm. S. Gray & Co., and in directing that the ketone be held pending shipping instructions. The authority of Mr. Conner arises out of the powers conferred on him by virtue of Compulsory Order No. 326-B/C, dated June 14, 1918, issued by the Director of Purchase, Storage, and Traffic.

2. It is the opinion of the Board that an implied agreement arose, whereby the Government acting through C. H. Conner, of the Wood Chemical Section, War Industries Board, agreed to purchase all the ketone which claimant might manufacture from the carload of acetone oil at $25\frac{1}{2}$ cents per pound, and directed claimant to hold the resultant ketone subject to shipping instructions from the War Industries Board. That as the ketone was produced it became the property of the Government (Antrim Iron Co. et al., Vol. IV, p. 640, Dec. B. C. A.), and that since the Government thereafter failed to give such shipping instructions, that the Government is liable to claimant for the fixed price of the ketone, $25\frac{1}{2}$ cents per pound, upon delivery to the Government f. o. b. claimant's plant. If, however, claimant with the consent of the Government retains the ketone, then claimant is entitled to the fixed price per pound of the ketone less the reasonable salvage value thereof at the time of final settlement.

DISPOSITION.

This Board will make a satutory award in accordance with this decision and will cause the same to be executed on behalf of the United States and by the claimant, and to be transmitted to the appropriate finance officer for payment.

Lieut. Col. McKeeby and Capt. Frazer concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

NOVEMBER 8, 1920.

Case No. 2533.

In re **CLAIM OF MARITIME MANUFACTURING CORPORATION.**

A decision was rendered in the above claim by the Board of Contract Adjustment on June 30, 1920. On appeal to the Secretary of War, that decision was affirmed substantially as written except as to two items—

(a) An award of \$2,797.16 for auditor's expenses, made by the Ordnance Claims Board and disallowed by the Board of Contract Adjustment, was reinstated.

(b) **GOVERNMENT'S RIGHTS TO THE BUILDINGS.**—The decision of the Board of Contract Adjustment was to the effect that the United States owned the buildings erected as special facilities and paid for by the United States, though the contract stipulated that only the title to machinery vested in the United States. The Secretary of War held that under the contract, the buildings became the property of the contractor.

(For statement of facts and decision of the Board of Contract Adjustment, see Vol. VI, p. 626, decisions of the Board of Contract Adjustment.)

Capt. Taylor writing the opinion of the Board.

ON RECONSIDERATION.

1. On June 30, 1920, the Board of Contract Adjustment rendered a decision in the above-entitled claim. For this decision the claimant appealed to the Secretary of War. By order dated October 11, 1920, the Secretary of War ordered the decision of the Board of Contract Adjustment to be revised and amended so as to conform to the recommendation of the Special Advisers dated October 8, 1920.

A restatement of the "Findings of Fact" is unnecessary, but it has been found advisable to rewrite the entire "Decision" in order to comply with the recommendation of the Special Advisers. The following is therefore adopted as the decision of the Appeal Section in lieu of the decision of June 30, 1920, and that decision is hereby vacated. The several items of the claim will be considered in the order in which they are set forth in paragraph 20 of the Findings of Fact in the decision of June 30, 1920.

DECISION.

1. *Item (a) Excess cost of manufacture due to—*

- (1) Delays in receipt of forgings.
- (2) Delays in receipt of base plugs.

By the first contract, the Government undertook to furnish the component parts "at such times as will enable the manufacturer to deliver the articles in accordance with the schedule of deliveries hereinbefore set forth," and by the second contract to furnish them at such times "as will enable the contractor to comply with the terms of this contract." The Government's obligation was absolute, whatever time was required. Claimant is entitled to the excess cost due to this delay. If the total can be ascertained it is immaterial how much should be apportioned to each.

- (3) Machining hand forgings.
- (4) Unloading surplus forgings.
- (5) Unloading surplus copper bands.
- (6) Machining shells in process.

The extra expense of machining forgings harder than the specifications allowed, the cost of handling material, and the work in process obviously come within the termination clauses of the contracts.

- (7) Maintaining excess staff, and other charges.

This item is apparently a part of items 1 and 2. It should be investigated and should be allowed if it has not already been settled.

General remarks applicable to item (a).—The figure of \$610,759.28 found by the Baltimore District Claims Board's audit and approved by the special committee of the Ordnance Claims Board as the total manufacturing expense is adopted as correct. However, the Appeal Section does not adopt the claimant's estimate of \$8 as its normal cost of manufacturing the completed shell had not the delay and the hard forgings complicated its task. This normal cost should be further investigated by the Ordnance Section. If an exact computation proves impossible, the Ordnance Section is in a position to make a satisfactory adjustment with the claimant. The Ordnance Section should also determine whether any part of this claim for excess costs duplicates the allowance already made for installation charges.

2. *Items (b) and (c). Equipment, land, and buildings.*—The question here is whether the claimant is entitled to payment under the termination clauses of the contracts for the equipment, land, and buildings which had originally belonged to T. McAvity & Sons (Ltd.).

Both the first and second contracts provide in identical language that in case of termination the United States will pay to the contractor the contract price of finished product, the cost of component materials and parts on hand, and "also all costs theretofore expended and for which payment has not previously been made, and all obligations incurred solely for the performance of this contract of

which the contractor can not be otherwise relieved." The contractor claims as coming within the language quoted the unamortized portion of the difference between the initial value of the land, buildings, and equipment and their value upon the cancellation of the contract.

With the exception of certain new buildings and machinery erected or installed in or after September, 1918 (for which settlement has already been made), the claimant's plant unquestionably belonged, prior to March, 1918, to T. McAvity & Sons (Ltd.). That company had been manufacturing shells for the British Government, but toward the end of 1917 a difference of opinion in regard to continuing in that line of business had arisen among its stockholders, who were all, or substantially all, members of one family. Negotiations were undertaken for the sale of its shell-manufacturing machinery to some concern in the United States, but the Canadian Government forbade its exportation. Allan McAvity, who was a member of the family and an employee, but not a stockholder of the corporation, having learned in Washington in February, 1918, that he could get a contract for T. McAvity & Sons (Ltd.) for machining 9.2 shells, proposed the formation of a new company under the laws of Virginia in order to meet the opposition in the family and at the same time permit the carrying out of the contract at the McAvity plant. There may have been additional reasons for organizing an American corporation. At all events, Mr. McAvity was told in Washington that there would be no objection to this procedure, and thereupon the Maritime Manufacturing Corporation was incorporated, and obtained a procurement order on which the contract of March 15, 1918, was based. The fulfillment of the contract was promptly begun in the McAvity plant without waiting for further technicalities.

At the time of the making of the contract the claimant had no property, its capital stock was unissued, its directors and incorporators were Allan McAvity and two of his nominees who did not become beneficially interested. Thereafter, in June, 1918, T. McAvity & Sons (Ltd.) transferred its shell-manufacturing machinery and equipment to two of the family as trustees, who in turn transferred it to the Maritime Manufacturing Corporation in exchange for \$849,800 par value of the latter's capital stock. This stock, however, was neither issued to the McAvity company nor turned over to it by the trustees, but was issued in the names of the several individual stockholders of T. McAvity & Sons (Ltd.), except a few who refused to participate and who were settled with in cash by one of the other stockholders. A schedule put in evidence by the claimant shows that these nonparticipants were only three in number, holding a total of less than 4 per cent of the McAvity stock, and the payment made to

them was a personal and not a corporate transaction. The only new stockholder in the Maritime Manufacturing Corporation was Allan McAvity. Of the \$849,800 issued in capital stock for equipment; \$701,561 represented equipment for 9.2 shells, and it was this amount which the Maritime Manufacturing Corporation asserts is a "cost theretofore expended," for the unrecouped portion of which it is entitled to reimbursement under the termination clause.

We do not think that this contention is sound. It is unnecessary to consider under what circumstances payments made in capital stock can be treated as costs, or whether the issued shares were in law fully paid and nonassessable, or had been approved by the Corporation Commission of Virginia or the Capital Issues Committee. The decisive fact is that T. McAvity & Sons (Ltd.) got nothing for its equipment. There may have been no creditors to object, and it is true that the dissenting stockholders were settled with; but, nevertheless, it was the stockholders and not the corporation that received the consideration. The claimant lays great stress on the technical difference in identity between the two concerns. From that point of view, one corporation is seen taking over the property of another without a dollar of consideration in any form coming to the latter. Such a disposition of assets must be presumed to be an illegality of which all parties had notice. If no one was wronged, and if no one is in a position to object, that is a condition which exists only because the parties were substantially the same. Technically, the property has not been paid for, because no payment has been made to the technical owner; substantially, there has been no purchase, because the beneficial ownership is unchanged.

The same reasoning applies to the transfer of the land and buildings in September. The original nominal consideration of \$700,000 (reduced later in connection with an adjustment for a new building to \$565,000) consisted merely of debit and credit entries between the two corporations. No security was given to T. McAvity & Sons (Ltd.) for the purchase money. The officers and directors of the McAvity company, all of whom were on the board of the Maritime company, permitted the latter not only to execute a first mortgage on the entire plant to secure a loan from the War Credits Board, but even to promise the latter that it would keep \$350,000 of its debt to the McAvity company unpaid until after reimbursement of the Government loan. The transfer of the property at this particular time seems, in fact, to have been a result of the insistence of the Government upon such a mortgage and agreement. What, if anything, was done on this occasion to take care of the dissenting stockholders does not appear.

Under these circumstances we do not think that the \$565,000 item constitutes either a payment or an obligation "incurred solely for the performance of the contract of which the contractor can not otherwise be relieved."

In disallowing these items for buildings, land, and equipment there is no intention to reflect upon either the good faith or the business judgment of the parties in forming the Maritime Manufacturing Corporation to execute these contracts. There were excellent reasons for doing so, and no deceit was practiced upon the Government. But as there would have been no claim against the Government for these items had the contracts been made and executed by the original owner of the plant, we do not think that its technical transfer to a new corporation organized under the circumstances and in the manner above set forth, even for the best of reasons, ought justly to create such a claim under the termination clauses of these contracts.

3. *Item (d), cost of guaranty.*—This item covers claimant's demand for \$50,000 which it states is due George McAvity, John McAvity, and T. McAvity Stewart, president, vice president, and Washington representative, respectively, of the claimant, for guaranteeing the claimant's note in favor of the United States Government for the sum of \$1,000,000. The guaranty was by private individuals who were officers and directors of the corporation. Reimbursement of expenses of this character has been denied in similar cases, and there is no exceptional reason for allowing it here.

4. *Item (g), salaries of executive officers.*—The Claims Board, Ordnance Department, has offered the claimant \$20,000 in settlement of its claim for salaries of executive officers from December 26, 1918, to date. Expenses of preparation and presentation of claims have been allowed only in exceptional cases, and in the discretion of the bureau board charged with adjusting the claim in the first instance. The Ordnance Claims Board having allowed \$20,000 on this item, the Appeal Section, War Department Claims Board, will not disturb this award.

5. *Item (h). Legal and auditor's expenses, charter fees, etc.*—Claimant admits that its legal expenses prior to suspension of the contracts have already been paid. As to its expenses since that date, the remarks made in connection with Item (g) are applicable. The Claims Board, Ordnance Department, has offered claimant \$2,797.16 in settlement of its claims for auditor's expenses, charter fees, etc., to date. This award by the Ordnance Claims Board will not be disturbed.

6. *Item (i). Care of Government property.*—Claimant should be allowed its expenses in caring for Government property wherever located.

7. *Item (i)x. Interest.*—Interest must be denied in accordance with well-settled practice and regulations.

8. *Item (e). Damages for delay.*—Whatever additional cost was occasioned by the delay has already been taken care of in Item (a). The profit that the claimant would have made had there been no delay seems to be largely speculative, but in any event all right of reimbursement has been eliminated by the supplemental contract, which was executed August 7, 1918. This contract recites that delays have been occasioned through fault of the Government, and then applies the remedy of extending the time within which the contractor is to deliver the completed shells. In view of this adjustment, we believe that any additional right to damages which may otherwise have existed must be deemed to have been waived.

9. *Item (f). Damages by reason of shut-down on December 26, 1918.*—The contracts reserve to the Government, in effect, the right to terminate on 30 days' notice. The contractor received such notice by telegram on November 26. Questioning the authority of the sender of the telegram, it was informed of what was in substance a confirmation by Washington. The subsequent receipt of the formal written notice did not repudiate the former notice, although it gave the claimant some additional time. Nothing in the contracts reserves any right to continue to January 31, 1919.

10. *Item (k). Ten per cent fee on contract No. 2.*—Under this item the claimant demands 10 per cent on the cost of expenditures under the second contract. The termination clauses contain no provision for such a fee. Claimant refers to pamphlet entitled "Instructions to bidders," dated September 25, 1917. The language being substantially different, the contracts control.

11. *Item (w). Interest paid on copper bands.*—Claimant's demand under this item for \$13,552.31 has nothing to do with the contracts under consideration. The claim is for interest paid under the terms of the contract made with the United States on March 16, 1920, by which it purchased forgings, copper bands, etc., from the Salvage Department of the United States. If the claimant took possession of the materials on or before the purchase price was determined, it properly paid interest down to the date of payment, and has no claim for a refund.

12. *The Government's right to the buildings.*—The view of the Board of Contract Adjustment as expressed in its decision of June 30, 1920, that the Government has an equitable interest in buildings 2, 3, and 4, and that their fair salvage value should be set off against the claim, is inconsistent with the express provisions of the second contract. In the event of cancellation, the Government agreed to pay the unamortized portion of the whole cost of the new facilities;

without any deduction for their present value, and reserved the right to take title to the removable property only. The merits of the bargain are not open for discussion now, the validity of the contract not being in question, and just as the claimant is bound by those provisions of the contract which bear hardly upon it, it can not be denied the benefit of those which are in its favor.

DISPOSITION.

The Appeal Section, War Department Claims Board, hereby transmits a copy of this decision to the Ordnance Section, War Department Claims Board, for appropriate action.

Lieut. Col. McKeeby and Lieut. Hendon concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

NOVEMBER 9, 1920.

Case No. 194.

In re **CLAIM OF ALCOHOL PRODUCTS CO.**

1. **SECRETARY OF WAR, APPEAL TO.**—Where an appeal to the Secretary of War the Secretary directs the Appeal Section to take further proceedings to determine whether a course of dealing between claimant and the Government had ripened into a custom, this Board will follow the directions of the Secretary of War, and, if the custom is established, will render a decision in accordance therewith.
2. **CUSTOM.**—Where in transactions between the Government and claimant it had been customary for the Wood Chemical Section of the War Industries Board to cause to be shipped to claimant acetate of lime and thereafter to issue orders to claimant for the manufacture of methyl acetate from said lime and required claimant to purchase and pay for the acetate of lime and hold the same subject to further orders by the Wood Chemical Section of the War Industries Board, and after the receipt of the lime by claimant and after it had paid therefor claimant receives no further orders for methyl acetate, there is an implied agreement on the part of the Government within the meaning of the act of March 2, 1919, to reimburse claimant for the cost of the acetate of lime and to otherwise save claimant harmless from any loss on account of the transaction.
3. **CLAIM AND DECISION.**—Claim for \$19,280.11 under the act of March 2, 1919, for acetate of lime. Held, an agreement within the meaning of said act.

Lieut. Col. Smith writing the opinion of the Board.

ON RECONSIDERATION.

1. This case was decided adversely to claimant by the Board of Contract Adjustment November 20, 1919 (Vol. II, Dec. B. C. A., p. 362).
2. From that decision claimant noted an appeal to the Secretary of War. The Secretary of War, upon consideration of the record and the recommendations of Special Advisers, under date of March 2, 1920, returned the record to the War Claims Board with the following order:

“This claim having been brought before me on petition for review of a decision of the Board of Contract Adjustment, under which claimant was denied relief, it is directed that further proceedings be taken in accordance with the views expressed in the

attached recommendation of the Special Advisers and accompanying letter."

3. The recommendations of the Special Advisers accompanying the order are as follows:

"This is a claim for reimbursement on account of depreciation in the value of 310 tons of acetate of lime allocated to claimant by the United States and left on claimant's hands at the time of the Armistice. The claim is based on an alleged course of dealing between the Government and this claimant, by which it is claimed the Government from month to month allocated to claimant such raw material as would be required for the manufacture of the quantity of methyl acetate the Government intended to call upon claimant to produce during the succeeding month or forty-five days.

"In October, 1918, two separate orders were issued by the Wood Chemicals Section of the War Industries Board, each for 150 long tons of acetate of lime, the originals being mailed to Wm. S. Gray & Co., N. Y., and copies to this claimant. These orders, issued, respectively, on Oct. 10th and Oct. 18th, represent the material for which claim is made in this case, and read as follows:

"You are hereby directed to ship to Alcohol Products Company 150 long tons acetate of lime (336,000 pounds) for use during the month of November, 1918.

"Such shipment is permitted and delivery to the United States of the product so shipped is waived on condition that such shipment shall constitute a waiver by you, on your own behalf and on behalf of all persons having any right, title, or interest therein of all claims against the United States and or its representatives, either by way of compensation or otherwise, by reason of the requisitioning or the placing of a compulsory order for, or the above-mentioned request for shipment of, the product so shipped, and a warranty that you are authorized to make such waiver on behalf of all persons having any right, title, or interest in such product."

"It seems to us clear that under appropriate conditions an implied agreement is deducible from a well-established course of dealing by which the Government, upon ascertaining its further requirements, was accustomed to issue such directions as quoted above, expecting and tacitly requiring the contractor to purchase the material thus released in reliance on receiving proportionate orders in the usual course.

"Whether the course of dealing between this claimant and the Government was sufficient to establish such a custom seems to us not to be adequately brought out in the testimony. Mr. Mason, for the claimant, testifies (p. 40)—

"We judged at the beginning of a manufacture what our formal orders would be by the amount of lime that Mr. Smith had released us—150 to 100. That's the only way we knew most of the time. We judged by the amount of lime released us what the amounts of the orders would be when they came along."

* * * * *

"(p. 41) 'He (Col. Hotchkiss, head of the Raw Materials Branch, Procurement Section, Bureau of Aircraft Production) would go in conference with the War Industries Board, as I understand it, and

say two months from now he was going to put through an 800-gallon order of methyl acetate, and, therefore, told the War Industries Board to allocate to the different manufacturers in methyl acetate the raw material, so they would have them on hand for the production of that preordered.'"

"Claimant is asked (p. 68)—

"Have you any formal contract?"

"And answers—

"The only evidence we have is this system of requisitions and general audit."

"It appears that claimant, on January 2, 1919, wrote Col. Hotchkiss, of the Bureau of Aircraft Production, saying—

"It has been the custom of this company throughout this war period to order raw material immediately upon receiving these releases, in anticipation of the receipt of Government-signed contracts. This, as you know, we did in good faith, and we believe we will be protected. Mr. Conner and others have assured us that Colonel Hotchkiss assumes for the Aircraft Board the responsibility for these releases.

* * * * *

"can we not have from your office a statement that these raw materials which were released by the War Industries Board for the 800,000-gallon order of airplane dope, which we understand was never placed, were released by the request of the Aircraft Production Board in good faith, and that you will recommend that the Aircraft Production assume responsibility for settlement of the same?"

"Colonel Hotchkiss' reply states that he is having the matter investigated, and expresses the hope that Congress will pass legislation permitting the adjustment of the Government's debts, without any definite statement as to the facts. Col. Hotchkiss was not called as a witness and no further statement from him appears in the record, nor is there any explanation as to the custom or course of business as to the release of commandeered material.

"Mr. Mason further testifies—

"Mr. Smith told me that the reason he allocated 300 tons to us for the month of October was because the French were going to use 126,000, the Aircraft two contracts would use 163,000, and 310,000 were to be used in the increased production on this visionary order for 800,000 gallons that they had talked over in conference and Colonel Hotchkiss had authorized."

"Mr. Smith does not testify.

"On the other hand, there are some statements that claimant requested material to permit a production of 200 gallons per day and that claimant put in a requisition or answers to a questionnaire monthly.

"Mr. Mason, for claimant, says claimant told the Government it—"was working up to 200 pounds capacity and would take all the lime they could give us."

"Later, however, the same witness testifies (p. 82)—

"We did not ask them what we could have in November. Each month they sent us what we could have."

"We think the evidence offered in behalf of the petitioner necessitates inquiry as to the practice of the Bureau of Aircraft Produc-

tion and of the War Industries Board with regard to the issuance of orders releasing commandeered raw materials in excess of requirements for orders already placed, and especially as to whether in relation to this claimant the Bureau made it a practice to cause the release only of such material as was requisite for orders about to be placed. It should also be ascertained whether the claimant had requested the release of the particular material in question; whether claimant had for the purpose of commercial production requested the release, either of this particular acetate of lime or of as great a quantity of acetate of lime as might be obtainable; and whether, at the time of the release in question, the Government was under a legal obligation, in the absence of such release, to take and pay for the acetate of lime by reason of a commandeering order or otherwise. If that were the case, it would seem that a course of dealing which relieved the Government of that obligation and transferred it to a contractor would, under certain conditions, tend to raise an implication of an agreement on the part of the Government either to give the contractor orders which would require the use of such acetate of lime or to reassume its previous obligation to take and pay for the lime. Such implication, however, could hardly be drawn if the contractor was accustomed to use the acetate of lime in his non-government business, and would in any event be substantially weakened if the release was on the initiative of the contractor rather than of Government agencies.

"We accordingly recommend that the record be returned to the Board of Contract Adjustment with the request that that Board, through its preparations section, ascertain the facts above outlined and thereafter take such further action as may be appropriate in accordance with the views above expressed."

(Sgd.)

R. C. GOODALE,
G. H. DORR,
E. HENRY LACOMBE,
Special Advisers.

The letter of E. Henry Lacombe, Special Adviser, referred to in the order of the Secretary of War, is as follows:

"As I understand the case, the situation is this—

"Claimant was making, from the date he began to operate his plant, under several successive contracts, each specifying amount, methyl acetate for the Government in quantities as called for and was making none for anyone else. When the Government wanted a definite amount of methyl acetate it gave a specific order, which claimant proceeded to fill. He could make the methyl acetate only from acetate of lime. The Government had commandeered all acetate of lime and allocated it only to persons who were to use it for Government purposes or for the British or French Government, or possibly, if proper cause was shown, for commercial purposes.

"The practice, at least in most instances, was that, before ordering the methyl from claimant, the Government ordered William S. Gay & Company, who had control of the line as a government agent, to allocate and ship to claimant a sufficient amount of lime to make the amount of methyl it was about to order from claimant.

Claimant was under obligation to accept and pay for such allocation of lime and to use it only for government purposes.

"This seems to be claimant's theory, and if he had had the services of the counsel who has prepared his notice of appeal, it might have been brought out more clearly on the hearing. I note that in a letter to Senator Frelinghuysen dated Jan. 6, 1919, it stated that for nine months before the cessation of hostilities claimant devoted its entire solvent department to the manufacture of methyl acetate for the Bureau of Aircraft Production. I think the testimony indicates this to be the fact (except as to British and French government production) but it is not made entirely clear. If shown by competent evidence, it would go far toward convincing me that there was an implied agreement that claimant was to manufacture as much methyl as the lime allocated to him would produce.

"With regard to the request for an unusually large allocation it may be noted that Mason testified that the War Industries Board had urged claimant to get up to a 200-ton capacity. His request indicated that he was up to that capacity. It would then be for Government to decide how much of what he asked for would be allocated. Under the conditions then existing it would greatly surprise me to learn that the Government would allocate any of its commandeered lime to claimant to be used for commercial purposes (other than sales to French or British government) unless he showed it some very good reason for thus diverting commandeered lime to peace purposes instead of war purposes.

"However, as the record is somewhat obscure, I am quite ready to concur in recommending that the practice of the Aircraft Production Board and the War Industries Board be further enquired into, and the reason shown why he was allocated this large amount—what the Government expected he was going to do with it. I have therefore signed the memorandum with yourself and Mr. Dorr, although it calls for some testimony as to the relations between the Government and the owners of the commandeered lime, which I do not think would operate to negative the existence of an implied contract if claimant's case is in fact what it is asserted to be in the notice of appeal. As I understand its contention, claimant, from the time of his first order early in the year to the end of hostilities, had no non-government business; it could manufacture no methyl acetate except for the Government or the Allies.

"I think the memorandum should make it very clear to the Board that satisfaction on all the points indicated above should be elicited. The Board seems to think that there can be no implied contract unless some one in authority specifically requires a claimant to do some definite thing."

4. By direction of the Secretary of War, as set forth in the above-mentioned order, further proceedings have been taken by the Appeal Section, War Department Claims Board, in accordance with the views expressed in the recommendation of the Special Advisers.

5. On October 26 and 27, 1920, the testimony of witnesses was taken. By this testimony it is conclusively established that the acetate of lime in question was not ordered by claimant from Wm. S. Gray & Co., but that the acetate of lime was shipped by Wm.

S. Gray & Co. to claimant at the direction of the Wood Chemical Section of the War Industries Board pursuant to the custom of such section to have in the hands of the manufacturers of methyl acetate a sufficient quantity of acetate of lime to produce such methyl acetate as claimant might thereafter, by the Wood Chemical Section, be directed to produce. The Government, through the Wood Chemical Section, was accustomed to issue such shipping directions as are contained in the orders of October 18, as amended by letter of October 24, 1918, and as contained in the order of October 10, 1918. In each of said orders Wm. S. Gray & Co. was directed by the Wood Chemical Section to ship 150 long tons of acetate of lime to claimant. The Wood Chemical Section expected and tacitly required claimant to purchase the material thus released to it and in reliance on claimant receiving through the Wood Chemical Section sufficient orders for methyl acetate as would require in its production the amount of acetate of lime which had theretofore been released to claimant. This course of dealing between claimant and the Government had continued for several months prior to the order of October 10, 1918. It was a custom of the Wood Chemical Section from month to month to allocate to claimant such acetate of lime as would be required for the manufacture of the quantity of methyl acetate the Government intended to call upon claimant to produce during the succeeding month. The acetate of lime so released to claimant was not intended by the Government to be used for commercial purposes, and during the period in question claimant did not use acetate of lime in commercial business, but its plant was engaged entirely in the production of chemicals for the Government. In view of the great demand for methyl acetate in aircraft production, the amount of acetate of lime released to claimant on October 10 and 18 was not unusually large, though, as a matter of fact, claimant received only 145 long tons under the first release, and only 44 long tons under the last release, of which only 310,000 pounds had not been required to fill orders.

The above facts are substantiated by the testimony of Mr. Chas. H. Conner, former chief of the Wood Chemical Section, and by Mr. Arthur H. Smith, formerly associate chief of the same section, and by other witnesses. There is no testimony to the contrary, and the facts are so abundantly established that it is deemed unnecessary to quote from the testimony of any of the witnesses.

6. Applying the principles declared by the Special Advisers to the established facts, it is the opinion of the Board that an implied agreement arose between the Government and claimant, whereby the Government agreed either to give claimant sufficient orders for methyl acetate as would require the use of the acetate of lime directed to be

shipped to claimant by the orders of October 10 and October 18, the latter as amended by the letter of October 24; or in case subsequent orders were not issued for methyl acetate requiring the amount of acetate of lime previously shipped, then the Government would take the acetate of lime so shipped to claimant which was not required to fill Government orders for methyl acetate and relieve claimant from any loss on account of such shipments.

7. The Government having directed the shipment of the 300 long tons of acetate of lime to claimant, and having thereafter failed to give claimant orders for methyl acetate which could be produced from the amount of acetate of lime actually received by claimant under such orders, thereupon became obligated to claimant for any loss that it may have suffered on account of the allocation to claimant of the acetate of lime in question and payment therefor by claimant.

DISPOSITION.

Certificate "C" will be executed with a document annexed, and this decision will be transmitted to the Air Service for appropriate action.

Lieut. Col. McKeeby and Capt. Frazer concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

NOVEMBER 9, 1920.

Cases Nos. 2629, 2630, 2631, and 2632.

In re **CLAIM OF DERBY MANUFACTURING CO.**

1. Cases Nos. 2629, 2630, and 2632 were decided by the Board of Contract Adjustment on June 3, 1920, and case No. 2631 was decided by the said Board on June 4, 1920, certain relief being granted the claimant. On appeal certain portions of the said decision of the Board of Contract Adjustment were affirmed and the said four cases were forwarded to the Ordnance Section, War Department Claims Board, for further action. (For statement of fact and decision see Cases Nos. 2629, 2630, and 2632, decided June 3, 1920, and Case No. 2631, decided June 4, 1920, Vol. V, these decisions, p. 960.)

Maj. Farr writing the opinion of the Board.

ON RECONSIDERATION.

1. Cases Nos. 2629, 2630, and 2632 were decided by the Board of Contract Adjustment under date of June 3, 1920, as follows:

“1. ‘No use of a chattel which is rightful in accordance with the contract under which its possession is held can constitute a conversion of that chattel.’

“‘If the owner of a chattel, either expressly or impliedly, assents to a use of the property by the person to whom he has given such possession which is different from the terms of the original contract, or if he assents to the sale of the property by that person he can not charge that the act so assented to constitutes a conversion of the property.’

“‘It is a well-settled rule that if the owner expressly or impliedly assents to or ratifies the taking, use, or disposition of his property he can not recover for a conversion thereof; and it is equally well settled that this is true notwithstanding defendant exceeded the power given him.’ (38 Cyc-2009.)

“2. The contracts construed as a whole, and especially as amplified in the supplemental contracts, clearly indicate the intention of the parties to be that *the contractor should account for the copper so furnished in finished articles pound for pound*. The Government suspended production and so placed it beyond the power of the contractor to furnish pound for pound in finished bands.

“3. The process of manufacture, well known to the Government, was such that it was impossible to keep the Government copper separate from any other copper used in the manufacture, and to have piled up and held at the contractor's plant the scrap resulting

from the use of the Government copper would have been a wasteful and dilatory method of manufacture.

"4. It is clear that the method used, namely, that of selling the scrap so resulting and procuring other copper in the proper shape for immediate process, was a rightful use of the copper furnished.

"5. Had the contractor been allowed to complete the contracts it would have returned in the shape of finished bands pound for pound the copper furnished by the Government. As the contracts were terminated by the Government, the contractor was thus obligated to account for said copper not furnished in the shape of finished bands, either by delivering to the Government the ascertained amount of copper not made into finished bands, or to pay the Government for the copper at its market value as of the time of the final accounting.

"6. It is, therefore, the opinion of the Board that the contractor should settle with the Government for the amount of copper ascertained to be due to the Government at its market value as of March 12, 1919, the date upon which the amount of copper due was ascertained.

"7. It is further the opinion of the Board that in ascertaining the amount of copper due to the Government, the contractor should be credited with 1,069,629 pounds of copper used by the contractor on Contract No. P18320-4522A in accordance with the decision of this Board in Case No. 150-C-2631."

2. Case No. 2631 was decided by the same Board under date of June 4, 1920, the decision of the Board being:

"1. Prior to and on November 8, 1918, the contractor was engaged in the manufacture of copper driving bands under three contracts, namely:

"Contract No. G2076-1133A.

"Contract No. P6197-2098A.

"Contract No. G1050-561A.

"2. Under the provisions of the above three contracts the Government was to furnish the contractor one pound of copper for every pound of completed bands, and the contractor was to furnish vehicle copper; but the contractor had in good faith and in accordance with customary manufacturing methods used Government copper in many instances as vehicle copper, and had sold the so-called scrap resulting therefrom, and instead of waiting for the scrap to be converted into the proper bowl shapes necessary for manufacture had been in the habit of purchasing virgin copper already in bowl shapes, thus replacing the scrap sold, and when the three contracts above mentioned were suspended there was approximately 4,826,703 pounds of Government copper which had not been returned to the Government in the shape of finished bands.

"3. If the contractor had been working solely under Procurement Order No. P18320-4522A, upon which the instant claim is based, and the Government had desired after its notice of suspension that the contractor complete a specific number of bands and in doing so it has been necessary for the contractor to use 1,069,629 pounds of its own copper costing the contractor 26 cents, then in that event, as the Government was obligated to furnish all the copper necessary, it would

have been proper for the Government to have reimbursed the contractor for the cost of its own copper so used; but, as a matter of fact, the contractor was engaged prior to and at the time of entering into the instant agreement upon the three contracts aforesaid and in order to hasten manufacture and in accordance with the customary method the contractor had converted into so-called scrap all of the Government copper furnished for the three contracts aforesaid, except such as had been returned in the shape of finished bands, and was indebted to the Government for approximately 4,826,703 pounds of copper, so that if on the date of the final suspension of production under the three contracts aforesaid the contractor had on hand 1,069,629 pounds of copper, or if the contractor subsequent to the date of suspension purchased such copper, then said quantity of copper was in fact the property of the Government and should have been tendered to the Government to fill any shortage in the delivery of Government copper under the instant agreement.

"4. So any copper which the contractor may have had on hand on the date of suspension of production under the three contracts was in reality copper which had been purchased with the proceeds of the sale of the scrap from Government copper and, therefore, in fact, Government copper.

"5. The act of March 2, 1919, under which alone the instant claim could be adjusted, provides for adjustment upon a fair and equitable basis, and it would be manifestly unfair and inequitable to permit contractor to settle its obligation to the Government arising under the three contracts aforesaid by paying for said copper at a depreciated market price and at the same time require the Government to pay the contractor for the copper used in process under the instant agreement at a higher market rate.

"6. For the reasons above it is the opinion of the board that the contractor is not entitled to reimbursement for the 1,069,629 pounds of copper at the rate of 26 cents per pound, but that said quantity of copper should be credited to the contractor as an offset against the 4,877,999 pounds of copper due the Government."

3. Claimant being dissatisfied with the opinion rendered in these four cases, under date of July 7, 1920, noted an appeal in each one to the Secretary of War. The claims, together with all the papers and exhibits, were in due course forwarded to the Secretary of War, and, under date of October 5, 1920, R. G. Goodale, Special Adviser to the Secretary of War, reported to the said Secretary as per the memorandum herewith incorporated:

"These claims are made under four written contracts for the manufacture of copper driving bands, and involve settlement for 4,826,703 pounds of copper furnished by the United States in excess of the quantity required for the copper bands delivered under three of the contracts, as well as adjustment of a claim of the company on account of a deficiency of 1,069,629 lbs. in the quantity of copper delivered by the Government under a fourth contract.

"The contract under which Claim No. 2629 arises was originally so drawn as to require the Government to furnish *all copper necessary, including 'vehicle' copper*. This contract provided that the copper so furnished should remain the property of the United States, but that

the scrap produced should be the property of the contractor. As the evidence indicates that two pounds of copper is necessarily used in producing each pound of the copper bands here involved, it is evident that the Government vastly benefited by the modification of this contract contained in the supplemental contract of April 29, 1918, which stipulates that the contractor shall furnish to the United States one pound of finished bands according to the maximum weight thereof, for each pound of copper delivered to the contractor by the United States. It does not appear whether the quantity of copper which had been furnished by the United States up to the date of the execution of the supplemental agreement was more than equivalent to the total weight of driving bands to be delivered according to the maximum weight specified. As to all copper delivered by the United States under the terms of the original contract before the execution of the supplemental contract, up to and not exceeding the total maximum weight of the bands to be delivered under this contract, it is plain that the contractor under the supplemental contract had an unrestricted right of use, either as vehicle copper or otherwise, in the process of manufacture under the contract, with no obligation except to continue manufacture under the terms of the contract and deliver at the time specified in the contract one pound of bands for each pound of copper received. If, at the time the supplemental contract was made, the contractor had received a quantity of copper equivalent to the total maximum weight of all the bands to be delivered, he would have been within his rights under the contract had he used the entire quantity in the proper processes of manufacturing the first half of the bands to be delivered without himself then furnishing any vehicle copper, thus producing one-half the total weight of bands required, together with an equivalent weight of scrap copper, which later the contractor would have had the right either to use in connection with vehicle copper to be furnished by himself in order to produce the remainder of the bands required under the contract, or to sell, relying upon seasonably buying at more advantageous prices new copper enough to produce the bands remaining to be manufactured. In other words, Government copper had been rightfully received under a contract which provided that the scrap should be the property of the contractor, and claimant was under no obligation to account for the scrap, but, was under the supplemental contract, under obligation to furnish one pound of finished bands for each pound of Government copper received.

"As to such copper, if any, as had been furnished by the United States before the date of the supplemental contract, in excess of the *pound for pound requirements of that contract* as applied to the total quantity of bands to be manufactured, the language of the supplemental contract itself furnishes no definite expression of the understanding of the parties. If that language were literally construed, it would, under the circumstances suggested, result in increasing the total quantity of bands to be furnished under the contract. I believe it to be a sound interpretation of the supplemental contract to assume that it was not the intention of the parties to increase the total quantity of bands to be furnished thereunder, and am of the opinion that if the total quantity of copper which had been furnished when the supplemental contract was executed exceeded the total requirements of the supplemental contract, an obligation arose on the part of the

contractor to return, in the form of copper, as distinguished from finished copper bands, any copper which had already been furnished in excess of the obligations of the Government on the pound basis specified in the supplemental contract. As to any such excess of copper received or used by claimant under this contract after the execution of the supplemental contract, the law imposes a similar obligation, and claimant having been under an immediate obligation to return or account for such copper, the same should be offset against any shortage of Government copper under contract No. 2631, as directed by the Board.

"But as to the copper furnished under this contract up to the pound for pound requirements, I think that no such offset can be made, as the sole obligation of the contractor was to furnish copper bands, and if after the armistice the claimant was ready and willing to furnish such copper bands up to the full requirements of the contract, it can not be put in a less favorable position by any change of plans on the part of the Government. If, after the armistice, the claimant had money but no copper it would be wholly unjust, in the absence of breach of contract or misappropriation of Government copper, to charge it with copper at 26¢, when it was willing and ready to fulfill all its obligations with copper which would only cost it 16¢. Had the price of copper *increased* instead of slumping it is plain that claimant could have been compelled to comply with its contract and furnish the full weight of copper bands made out of copper bought at the increased price at its own expense. With the price of copper up, claimant could not have discharged its obligations by offering to pay for the necessary copper at its former price of 26¢, and with the price of copper down, the Government cannot demand settlement on that basis.

"The contract under which claim No. 2630 arises is of the same character as that discussed in connection with the claims of the *New Jersey Tube Company*. It obligates the United States to furnish one pound of copper for every pound of completed bands, maximum weight; it provides that the scrap shall be the property of the contractor, but that the copper furnished by the United States shall remain the property of the United States, and impliedly obligates the contractor to furnish the necessary vehicle copper for the processes of manufacture. As it appears that the claimant has wrongfully used Government copper as vehicle copper under this contract, the recommendations made in the *New Jersey Tube Company* cases appear to be applicable, and the decision of the Board should be so modified as to charge the claimant with the full value of all Government copper used in excess of the maximum weight of the bands delivered under this contract.

"Claim No. 2632 is for 2,000,000 pounds of copper driving bands for 155 m/m shells. It arises under a contract similar in its provisions to that above referred to in connection with the consideration of claim No. 2629, and was modified by a supplemental contract in the same manner. The recommendations which I have made with regard to claim No. 2629 are applicable also to claim No. 2632.

"I recommend that the decision of the Board be set aside, and that further proceedings be directed to be had in accordance with the foregoing memorandum."

4. On the 6th day of October, 1920, the Secretary of War returned the said claims to this Board with the following order:

"Upon consideration of the record in these matters, it is directed that the decision of the Board be vacated, and that further proceedings be had in accordance with the recommendations contained in the accompanying memorandum."

5. By direction of the Secretary of War as set forth in the foregoing order the decision of the Board of Contract Adjustment in these cases bearing dates of the 3d and 4th of June, respectively, are hereby vacated and set aside and the files and all the exhibits attached thereto are forwarded to the Ordnance Section, War Department Claims Board, for proceedings in accordance with the aforesaid memorandum of the Special Adviser and the said order of the Secretary of War.

Lieut. Col. McKeeby and Capt. Sheppard concurring for the appeal section; Col. Morrow concurring for the War Department Claims Board.

NOVEMBER 9, 1920.

Case No. 2857.

In re **CLAIM OF GENERAL MOTORS CO.**

1. **INCREASED FACILITIES.**—Where claimant, without direction from some Government agent, increases its facilities upon the assumption that it will receive future orders, it does so at its own risk, and the Government is not obligated to reimburse it such expenditures.

Maj. Hill writing the opinion of the Board.

This claim was presented under the act of March 2, 1919. Statement of claim, Class "B," has been presented for the sum of \$119,155.62 by reason of an alleged informal agreement between claimant and the Procurement Division of the Ordnance Department for increase of facilities and additional orders for trench mortar shells.

FINDINGS OF FACT.

1. On December 15, 1917, the Ordnance Department, by letter, forwarded Procurement Order No. War-Ord. G1021-414TW, dated November 24, 1917, to the General Motors Corporation, Detroit, Michigan, ordering 2,000,000 3-inch Stokes trench mortar shells, Mark I, unfused. The General Motors Corporation proceeded to manufacture under this order, and at a later date this order for 2,000,000 was increased to 3,000,000, and on May 8, 1918, a proxy-signed contract was drawn for the manufacture of 3,000,000 of these shells.

2. This contract contained the following clause:

"It is estimated that the cost of such increased plant and facilities will amount to approximately \$60,000, and to this extent the United States will amortize and take title to the increased plant and facilities, or, at the option of the contractor, the Government will partially to the extent of 50% thereof amortize such increased plant and facilities."

3. Upon the signing of the armistice the proxy-signed contract was suspended. Claimant filed a Class "A" claim before the Ordnance Department, which has been allowed. The present matter is consideration of a Class "B" claim, which has to do with increased facilities and indirect materials which were incurred outside of the performance of the strict provisions of the contract as written and as executed.

4. It is alleged by the claimant that, due to delays on the part of the Government in furnishing certain component parts, it became necessary for it to increase its facilities in order to make deliveries as per schedule as set forth in the contract; that these increased facilities were installed upon the promise of Maj. Fairchild and

Capt. Wilmer, of the Ordnance Department, that claimant would receive largely increased orders at the completion of the present contract.

5. The claimant's representative, Mr. K. W. Zimmerschied, who at the time of the alleged agreement was managing the Washington office of claimant, in his evidence before this Board stated as follows:

"I want to make that very clear, that there was never a specific promise of any definite number of shell, but that in all human probability they were coming through."

He also states, in reference to Maj. Fairchild and Capt. Wilmer, that—

"They at no time actually promised us in so many words additional orders of shells, but told us that in all human probability they would be required, and it was up to us to make a record on the production of these shells."

6. Maj. Fairchild, who at the time of the alleged contract was in charge of the Trench Warfare Branch of the Gun Division, which was later merged into the Procurement Division, testified that both he and Capt. Wilmer told Mr. Zimmerschied that—

"we could proceed only on the basis of requirements actually issued by the departments; that we could not tell that there would be additional quantities of these shells, because we did not know * * *."

Maj. Fairchild also stated that—

"we expressly refused to make any commitment, because we could not do so."

7. Capt. Wilmer has submitted to this section an affidavit which claimant has consented shall be admitted as evidence in lieu of his direct testimony. In this affidavit Capt. Wilmer states with reference to Mr. Zimmerschied:

"He was told that we had no information as to additional requirements of said shell, and that we were unable in any sense to assure him that additional shell would be required, or that additional orders would be given him."

DECISION.

It is the opinion of this section that the increased facilities and indirect materials claimed were established and obtained without authority or instructions from the Government or any of its agents; that the claimant assumed a business risk in the making of such expenditures; and that there is no obligation on the part of the Government to reimburse the claimant for the expenditures so incurred.

The claim is accordingly denied.

Lieut. Col. McKeeby and Lieut. Tabb concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

NOVEMBER 9, 1920.

Case No. 2911.

In re **CLAIM OF ROLLIN CHEMICAL CO.**

1. **IMPLIED AGREEMENT.**—An implied agreement under the act of March 2, 1919, does not arise from assistance given a contractor by the War Department in securing a loan from the War Finance Corporation even though it appears that the loan would not have been made had not the War Department urged the War Finance Corporation to assist the contractor.
2. **FACILITIES.**—The Secretary of War has no authority under the act of March 2, 1919, to pay for facilities purchased prior to the date of the informal contract.
3. **CLAIM AND DECISION.**—Claim for \$447,397.50, under the act of March 2, 1919, for facilities alleged to have been purchased under an implied agreement. Held, claimant is not entitled to relief.

Maj. Miller writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under the provisions of Supply Circular No. 17, Purchase, Storage, and Traffic Division, General Staff, 1919, for \$447,397.50, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The claim covers amounts expended for special facilities, claimant urging that the Government entered into an implied agreement to pay for these facilities, the alleged implied agreement having arisen through the action of the War Department in assisting claimant to secure a loan of about \$800,000 from the War Finance Corporation. Claimant entered into several formal contracts with the Government during the year 1918, and settlements on these formal contracts have been made or are being made by the Ordnance Section, War Department Claims Board. The claim for special facilities presented in this case is based entirely upon an implied agreement alleged to have been made in addition to the formal contracts.

3. Owing to the fact that claimant had carried on negotiations with various officials of the Government relative to the matters which now constitute this claim, the hearing conducted by this section was attended by representatives of the Ordnance Section, War

Department Claims Board, Chemical Warfare Service, and the War Finance Corporation, in addition to claimant's attorney and the officials of this section.

4. Prior to the outbreak of the World War claimant had been manufacturing various chemicals, including barium sulphide, barium hydrate, barium nitrate, barium binoxide, barium carbonate, blanc fixe, and sodium sulphide. During the year 1917 and the early part of 1918 claimant had been manufacturing chemicals for commercial use and for the use of the French and British Governments. In 1917 its plant at Charleston, W. Va., was materially increased from a cost of \$600,000 to \$2,000,000. Additions to this plant were made during the year 1918 to the extent of \$447,397.50, this construction having been carried on during the entire year. In May and June, 1918, the Ordnance Department sent telegrams to claimant asking if claimant had open capacity for various chemicals, and each time received reply in the negative with the information that claimant's capacity was in use by the French and English, so the question of securing these chemicals from claimant was closed.

5. Claimant had been conducting its purchases and sales through the National Aniline & Chemical Co. (Inc.). The fees for handling these purchases and sales had accumulated to the amount of \$140,000, and certain loans and advances totaled \$460,000. Therefore the total indebtedness of claimant to the National Aniline & Chemical Co. (Inc.) was \$600,000 in June, 1918. At that time the National Aniline & Chemical Co. (Inc.) informed claimant that it would not carry this indebtedness any longer and that claimant would be compelled to make immediate payment of same. Claimant company did not have the funds with which to settle this indebtedness and it became apparent that unless funds were secured the company would be placed in the hands of a receiver. Claimant's attorney at the hearing before this Board explained the situation in the following language: "Mr. Rollin had projected this enterprise before this time (Sept. 5, 1918). He had expected to go into it as a commercial proposition because he could get contracts from France and England at 22 cents or 25 cents a pound, so he had made his plans and projected them but was not able to carry them through."

6. In August, 1918, Mr. Hugh Rollin, president of the Rollin Chemical Co., came to Washington and called on Maj. W. H. Gelshenen, Ordnance Department, United States Army, chairman of the Army Commodity Committee on Acids and Heavy Chemicals, and explained the financial condition of the company. Maj. Gelshenen's testimony shows the reasons for Mr. Rollin's visit. He said:

"Some time in August, 1918, Mr. Rollin came to Washington, and came in to see me, and stated that he had this plant in West Virginia, I believe it was, that would have to close down unless it was

able to obtain financial assistance; that they were making chemicals for one of the government branches or more, also for the Allies, and that they had various capacities for different chemicals, which he enumerated.

* * * * *

"I do not think anything was done at the first interview, but he was told to go back and get such facts together as he could and report on to Washington again, which he did some time later, and also a statement of his financial condition at the time.

"In going over the statement it showed that they were indebted to the National Aniline Company for \$750,000.00. They were the largest creditors. They had acted as their agents in the purchase of supplies and in the sale of their product, receiving a percentage both ways.

* * * * *

"Rollin's story was that he was in this financial position due to the fact that he had been so late in receiving his deliveries, and the plant had cost so much more than was anticipated that the working capital was all absorbed in putting up this plant, and I am very distinct in my recollection that there was no question about additional facilities. It was a question of getting the facilities that he had, after the French and English finished with them, and the other facilities that he had at the time."

(Transcript, pp. 23, 24, and 25.)

"I want to point out from the Ordnance side that Mr. Rollin came to the Ordnance Department unsolicited. If we were looking for production at the moment, we would have communicated with Mr. Rollin and had him come up to see us at our solicitation; but Mr. Rollin came in and made the definite statement as his opening remark that the Rollin Chemical Company would go into the hands of a receiver failing to receive \$800,000 to \$1,000,000. What we could supply him and what we could not supply him was touched upon in conversation, and even a tentative contract may have been suggested along certain lines, 'would you do this or would you do that?' But the fact that the Ordnance Department at that time solicited Mr. Rollin is not so. Mr. Rollin needed this \$800,000, not for anything that the Ordnance Department was having him do but merely to keep himself going."

(Transcript, pp. 64 and 65.)

While the Ordnance Department prior to August, 1918, had given practically no orders to claimant, nevertheless it was anxious to assist this company in arranging its financial affairs in order that the company might continue the production of chemicals, since the company at that time was devoting a considerable part of its plant to the manufacture of chemicals for war purposes furnished directly or indirectly to the French, British, and the United States Governments. With this end in view, Maj. Gelshenen and his assistants discussed various plans in an effort to assist the company in securing loans. The Ordnance Department prepared formal contracts covering the chemicals that it would desire from claimant and the Chemical Warfare Service followed the same procedure.

8. Negotiations were then taken up with the War Credits Board for a loan to claimant. However, the War Credits Board was limited in its loans to 30 per cent of the amount of the contracts given claimant directly by the War Department. The War Credits Board therefore agreed to loan claimant \$121,000—\$104,000 on the Ordnance contracts and \$17,000 on Chemical Warfare Service contracts. These amounts were loaned on September 21, 1918, and September 26, 1918, respectively.

9. As soon as the limits of the loans to be made by the War Credits Board were determined it became apparent that claimant must negotiate further loans from another source. Accordingly, Mr. Rollin presented the matter to the War Finance Corporation. In order to assist Mr. Rollin in securing this loan, Maj. Gen. Wm. L. Sibert, Director of Chemical Warfare Service, wrote the War Finance Corporation on August 29, 1918, as follows:

“1. The Rollin Chemical Company is now producing about 225 tons per month of Sulphur Chloride that is being used in the manufacture of mustard gas. I am informed by the President of the company that they were going to waste surplus Chlorine from which 225 tons a month of Sulphur Chloride could be made.

“2. This production of Sulphur Chloride is of vital importance to the Chemical Warfare Service, and in my opinion the company should receive financial assistance if it is necessary.”

Maj. Gen. Sibert later explained that “with gaseous chlorine available, making sulphur chloride requires very little plant.”

10. Maj. Gelshenen on the same date sent the following letter to the War Finance Corporation:

“1. I am directed by the Chief of Ordnance to inform you that the Rollin Chemical Co., Inc., is at the present time devoting its entire time to war contracts, either directly or indirectly, and that the shutting of this plant for the lack of funds at this time would be little short of appalling—in fact, the military necessity of the continued operation of this concern is such that it *must* be aided financially if the serious dislocation of the various programs of the Ordnance Department is to be prevented. Furthermore, even a temporary shut down of this plant would be enormously costly, both from the standpoint of deterioration of the plant, as well as the delay in the various programs, and accordingly any such arrangements should be made immediately, if possible within the next two weeks.

“2. The total estimated amount of the War contracts of this concern, both directly and indirectly, is at least \$1,800,000.00, as more fully appears in detail in various papers which are being submitted to you by the representatives of the company.

“3. It is requested that this matter be given the most urgent and earnest consideration at the earliest possible date.”

11. On September 5, 1918, a conference was held between the representatives of the Rollin Chemical Co. and the War Finance Corporation, this conference also being attended by Capt. W. H.

Swenarton, of the Ordnance Department, and by representatives of the War Credits Board. Capt. Swenarton had been instructed by Maj. Gelshenen to assist the company in securing the loan from the War Finance Corporation. At this conference Maj. J. L. Motley, of the War Credits Board, explained that his board in its loans to contractors was "limited to 30 per cent of the value of the supplies," and that it was considered impracticable to commandeer this plant. Capt. Swenarton urged the making of this loan, showing that this company was devoting the greater part of its plant to war contracts. The following excerpts from a report of this conference throw valuable light on the present claim:

"Maj. MOTLEY. Well, I understand the plant will have to close down within a week or two if it is not financed now.

"Mr. McLEAN. Well, from your investigation and that of your experts are you of the opinion that the cutting down of the plant would seriously interfere with the war operations?

"Maj. MOTLEY. Very seriously; yes, sir.

* * * * *

"Mr. McLEAN. Now, we would like to hear from Capt. Swenarton. Now why, in your opinion, is it necessary that we should lend this money, Captain?

"Capt. SWENARTON. Because this man is one of few in many cases and in other cases the only manufacturer of certain essential war products. For example, he is the only manufacturer of barium monoxide in this country, and that is used exclusively, almost, by the Frankfort Arsenal, by the British Government, and by the French Government, particularly in making aeroplane bullets.

"Another produce which he manufactures in large quantity is sulphur chloride, which is used exclusively by the Chemical Warfare Service.

"Mr. McLEAN. What percentage of his output is the War Department taking and is liable to take?

"Capt. SWENARTON. It is taking all he can make.

"Mr. McLEAN. So really all of his production goes far to war production?

"Capt. SWENARTON. All but eight per cent of his production, practically, goes either directly or indirectly into essential war products.

"Mr. McLEAN. You are representing the Ordnance Department?

"Capt. SWENARTON. Yes, sir.

"Mr. McLEAN. You have been requested, I believe you stated to us the other day, to come here and urge this Board to make this loan?

"Capt. SWENARTON. Very emphatically.

* * * * *

"Mr. McLEAN. Have you any opinion as to the value of this property?

"Capt. SWENARTON. I have read the report of Mr. Chase, who went down in behalf of this Board, of the War Industries Board.

"Mr. McLEAN. He went at our request.

"Capt. SWENARTON. At the request of this Corporation. And also I was a chemist at one time myself, and I am pretty well satisfied from the statements which have been made by the representa-

tives of this company that the plant is worth at least \$2,000,000, and that as a peace proposition it would be worth practically that amount at a conservative estimate.

* * * * *

"Mr. LEONARD. I would like to ask Mr. Lutkin why the Aniline Company feels that they are safe in subordinating their claim, if they feel so.

"Mr. LUTKIN. Well, the Aniline Company, I think, have formed an impression that the claim—that they will be safe in subordinating their claim—that the value is there in the property. At the same time it feels that it is doing it in addition from the Government standpoint. They think it is a necessity for this man to exist, and they feel a desire to cooperate with Mr. Rollin in developing his enterprise, which they believe has possibilities as a peace enterprise, but in doing it we realize that from a business standpoint we are not strictly justified in subordinating a current claim to a deferred claim, but we feel safe enough in the enterprise to be willing to do it.

"Mr. LEONARD. On a peace basis?

"Mr. LUTKIN. On a peace basis.

"Mr. LEONARD. Because you realize that naturally your recoupment comes on a peace basis?

"Mr. LUTKIN. Yes, sir.

* * * * *

"Capt. SWENARTON. When the war is over there will be no new contracts.

"Mr. McLEAN. Suppose the war is over in our case, and we can't get our money back. We are acting here in advance, and we have got to take good security, and we have got to act as conservative, safe bankers would. We are trying to do something heroic to help the situation out, and you gentlemen might as well get into that frame of mind.

"Capt. SWENARTON. We think we are in exactly that frame of mind. What is the security on the plant for if it is not to recoup you?"

This conference was concluded with a discussion of the terms to be contained in the formal loan agreement, including the amount of mortgage bonds that would be required by the War Finance Corporation and the insurance that should be assigned as further security.

12. In accordance with the agreement reached at the conference of September 5, 1918, a formal agreement covering a loan of \$800,000 from the War Finance Corporation to the Rollin Chemical Co. (Inc.) was prepared and signed by the parties to the agreement on September 30, 1918. This agreement, among other things, provides that the indebtedness of the Rollin Chemical Co. (Inc.) to the National Aniline & Chemical Co. (Inc.), amounting to \$600,000, is subordinate to the indebtedness to the War Finance Corporation; that notes of the Rollin Chemical Co. amounting to \$800,000 will be issued in favor of the corporation; that the Rollin Chemical Co. will deposit and

pledge with the corporation as collateral security for the said notes 7 per cent general mortgage bonds, on the basis of not less than \$1,000 principal amount of said bonds for each \$727.27 face amount of such notes; that the Rollin Chemical Co. will insure its buildings, manufacturing plants, machinery, and personal property against loss by fire, explosion, and other acts and causes for a total of \$1,200,000 (practically one-half of the plant's cost); that the Rollin Chemical Co. will insure and keep insured the lives of the president of the company and other employees who are familiar with the secret processes owned or held by the company in an amount satisfactory to the corporation.

13. At the time that the conference of September 5 was held claimant had outstanding war contracts, including direct and indirect, amounting to \$1,800,000. On September 16, 1918, the Ordnance Department gave claimant a formal order for 2,400,000 pounds of carbon tetrachloride amounting to \$348,000, and on September 21, 1918, the Chemical Warfare Service gave claimant an order for 3,600,000 pounds of sulphur monochloride amounting to \$252,000. It was conclusively shown at the hearing by various Government witnesses that claimant was given all of the orders for chemicals promised by Government officials. In fact, it is not contended by claimant that it was not given all of the orders promised by the Government, the sole contention being that the Government, through its activities in assisting claimant to secure a loan, entered into an implied agreement to remunerate claimant for certain facilities paid for by a portion of the funds realized from the loan. Claimant completed practically all of the orders received from the Government, but in those cases where it became necessary to suspend performance on the formal contracts prior to their completion due to the signing of the armistice, settlements are being made in accordance with the terms of such written contracts and the supply circulars covering such settlements.

14. The evidence presented to this Board shows that very little was said by Government officials concerning the question of facilities. Relative to this matter, the following testimony was received from Maj. Gelshenen, Capt. Swenarton, and Maj. C. E. Sholes, a former negotiating officer of the Ordnance Department:

"Mr. GELSHENEN. To the best of my recollection, Mr. Rollin claimed that he had these facilities that we wanted.

"Question. And this big loan was to take care of——

"Mr. GELSHENEN (interrupting). Keep them going.

"QUESTION (continuing). General operations?

"Mr. GELSHENEN. Yes. Well, there might have been some talk, but there was nothing contemplating that this \$800,000 was to be for increased facilities; nothing like that.

"QUESTION. Nor that \$500,000 was to be used for increased facilities.

"Mr. GELSHENEN. No. It is pretty difficult to remember a conversation two years afterwards, but I am very positive in my opinion that increased facilities, to any extent, were not contemplated, because, when these contracts were made, where increased facilities were to be made, it was specifically stated that such and such a part of it was to be had, and it was worked on a certain method. If that had been the case, we could have given him an Ordnance Contract without going to the War Finance Board.

"Mr. SMITH. The idea was that they had the facilities already on hand?

"Mr. GELSHENEN. Yes, sir; to keep them going.

"Mr. GELSHENEN. I understood from him that he had the equipment practically completed, and that he was ready to take orders if we would give them to him. The difficulty was that we were not in a position to give them to him.

"Mr. SWENARTON. I never said a word about increased facilities in the whole conversation I had with Rollin. It was never mentioned in my dealings.

"Mr. SHOLES. To my best knowledge and belief, we never discussed any increased facilities with Mr. Rollin. The only questions discussed were his financial condition, the money that he owed the National Aniline Chemical Company and its disposition, and the financial reliefs which were essential to the continuance of his business.

"Mr. SHOLES. In my judgment, at the time, the question was not particularly one of any increased facilities or anything of that kind, but perhaps was only the result of going ahead on estimates of costs, etc., which were not justified by actual performance, and that Mr. Rollin was in serious financial trouble accordingly.

"Mr. SHOLES. No additional facilities were ever discussed during that time. Certainly, Mr. Rollin did not mention it. It was only the very great trouble that we were endeavoring to help him get out of, which was good business with the Government."

15. An audit of the company's records prepared by Government accountants shows that claimant expended for facilities in the year 1918 the sum of \$447,397.50, which is the amount of this claim. Of this amount, \$155,208.50 was for equipment purchased in 1917, but installed and paid for in 1918. The record further shows that the following equipment was purchased during the second half of the year 1918:

From June 29 to September 10.....	\$33,707.24
From September 11 to November 13.....	28,045.81
From November 14 to December 31.....	17,833.27

. The date of the purchase, which is understood to be the date on which the obligation was incurred, is evidenced by the date of invoice to claimant. Of course, a greater quantity of equipment was actually installed and paid for during these periods than is shown by the above, these figures showing only the dates on which the obligations were incurred. It will be noted that between the date of the conference of September 5, 1918, and the date of signing of the armistice claimant actually purchased facilities amounting to \$28,045.81 only.

DECISION.

1. The claim as presented covers the purchase and installation of additional facilities under an alleged implied agreement made on or about September 5, 1918.

2. The act of March 2, 1919, authorizes the Secretary of War to adjust, pay, or discharge certain agreements, express or implied, when expenditures have been made or obligations incurred upon the faith of such agreements prior to November 12, 1918. Under this act, therefore, this Board, acting as agent of the Secretary of War, is limited in adjusting claims, to those obligations incurred or expenditures made on the faith of an informal agreement. Obligations incurred prior to the date of the alleged agreement could not have been made on the faith of any such agreement, and the Secretary of War can only pay for obligations incurred after the informal agreement arose. Claimant's counsel urges that it is immaterial whether the funds were used to pay the unpaid purchase price of equipment previously installed or to pay for new equipment purchased after the date of the agreement. In this opinion this Board can not concur, for it has repeatedly held that the Government can not pay for facilities purchased prior to the date of the agreement. Where facilities are acquired prior to the inception of a Government contract as part of general preparations to seek Government orders, which are later awarded, no reimbursement of unabsorbed amortization on such facilities will be allowed (American Radio & Research Corporation, Cases Nos. 2595, 2596, and 2597, these decisions; Joliet Forge Co., Case No. 2677, these decisions; Massachusetts Copper Casting Co., Case No. 2574, Vol. 5, decisions War Department Board of Contract Adjustment, p. 672; Monmouth Chemical Co., Case No. 2641, Vol. 6, decisions War Department Board of Contract Adjustment, p. 23).

3. The evidence shows that between the date of the alleged agreement, September 5, 1918, and the date of the armistice, claimant purchased facilities amounting to only \$28,045.81. During this same period claimant was awarded contracts by the Ordnance Department and the Chemical Warfare Service amounting to \$600,000, these con-

tracts being given in addition to Government contracts previously awarded claimant and the indirect war contracts handled by this company. It will be seen, therefore, that the facilities purchased between September 5 and November 11 were small in amount compared with the contracts awarded claimant during that same period. If we go back to June 29, 1918, we find that from that date until December 31, 1918, claimant incurred obligations for facilities amounting to \$79,586.32, but other orders were also given claimant during this period. Claimant does not fix the date of the alleged implied agreement earlier than September 5, 1918, but the cost of facilities purchased during the six months' period is stated here in order to show what part of the facilities installed in 1918 and costing nearly one-half a million dollars was purchased during the last six months of the year 1918.

4. The courts have held that an implied agreement is one that is presumed from the acts of the parties.

"A contract implied in fact, or an implied contract in the proper sense, arises where the intention of the parties is not expressed, but an agreement in fact, creating an obligation, is implied or presumed from their acts, or, as it has been otherwise stated, where there are circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intent to contract. * * * The implication, of course, must be a reasonable deduction from all of the circumstances and relations of the parties, although it need not be evidenced by any precise words and may result from random statements and uncertain language."

(13 Corpus Juris, 241.)

"The term implied contract is generally used to denote a promise which the law, from the existence of certain facts, presumes that a party has made."

(Davis v. Seymour, 50 Conn., 531.)

"A contract implied in fact arises where there was not an express contract, but there is circumstantial evidence showing that the parties did intend to make a contract."

(Bouvier's Law Dictionary.)

5. Applying the definitions of the courts, it becomes necessary to inquire as to whether the steps taken by the various officers of the War Department could be presumed as a promise on their part that the Government would pay for such facilities as were purchased by claimant from the borrowed funds and whether "according to the ordinary course of dealing and the common understanding of men," there was shown an intent to enter into a contract to the effect that the Government would pay for these facilities. This Board finds no acts or statements of the Government officials in connection with the various negotiations with the War Department and the War Finance

Corporation which would imply that these Government officials intended that the Government should pay for such facilities as were purchased with the money loaned by the War Finance Corporation. No such agreement could be presumed from the various statements made by the officers of the War Department to claimant or to the War Finance Corporation. No evidence has been submitted to this Board which could be construed as any such promise. Neither were the acts of these War Department officials such as would raise a presumption that any such agreement was intended. The evidence shows that the money was not secured for the purpose of purchasing new facilities, but, on the other hand, was borrowed in order to pay an indebtedness of the company and for the purpose of carrying on general operations. It is true that certain of these funds were used to pay for facilities which had been previously purchased, but, as shown above, practically all of these facilities were ordered by claimant before the date of the alleged agreement.

6. Prior to the consummation of this loan, claimant was on the verge of a receivership. It had been producing chemicals for war purposes, consigning the same to the British and French Governments and to certain private companies. Some contracts, but covering small quantities of chemicals, had been awarded claimant company by the United States. Mr. Rollin's trip to Washington was not made in response to any request from the War Department. He came to the War Department because he needed \$1,000,000 and thought that the War Department could assist him in securing these funds. Certain officers of the War Department gladly gave this assistance because all desired that this company remain in business, although the plant could have continued operations even after going into the hands of a receiver. These officials did not think it advisable for the Government to take over the plant if the company could secure a loan which would tide it over the financial difficulty. They therefore set to work in an effort to assist Mr. Rollin and his company in securing the desired funds. The Ordnance Department and the Chemical Warfare Service each awarded contracts for as much material as was desired. Loans were then secured from the War Credits Board. These being inadequate, a strong case was presented to the War Finance Corporation. Officers of the War Department accompanied Mr. Rollin to the offices of the War Finance Corporation and there presented the necessity for the loan. In all of these dealings there never arose in the minds of the War Department officials any idea that the Government should remunerate claimant for facilities paid for from the borrowed funds. Even Mr. Rollin, the president of the claimant company, could not have had at that time an understanding that the Government was to pay for these facilities. He was

then asking for help to save him from a financial crisis and must have been pleased that he was able to secure loans aggregating nearly \$1,000,000, and no doubt was gratified and satisfied with the assistance that the War Department officials had given him.

7. Has claimant been damaged in any way or has it realized any financial loss through the acts of these Government officials? At the time that the loans were secured it appeared that claimant would suffer irreparable loss through the closing down of its plant. After these funds were secured, claimant completed the performance of a number of contracts with the United States, British, and French Governments and private individuals which could not have been performed if the loan had not been made. It appears, therefore, that the assistance given claimant in securing this loan was the company's salvation and that the company should have been in a much better financial condition at the close of the year 1918 than it was when the loan was secured, especially in view of the fact that a very small amount was expended for facilities purchased between September 5, 1918, and December 31, 1918.

8. Reference should be made to the basis on which the loan was made. Of course the statements of War Department officials, and especially those of Capt. Swenarton, had great weight in effecting the loan. This is evidenced not only by Capt. Swenarton's statements but also by the testimony of Mr. Angus W. McLean, manager and director of the War Finance Corporation, who shows that the loan would not have been made had not the War Department represented to the War Finance Corporation that this company was manufacturing chemicals used in the prosecution of the war and that the War Department desired that this company be maintained as a going concern, which could not be done unless the desired funds were secured. This is not surprising. The War Finance Corporation no doubt followed a strict rule in making loans to manufacturers that loans would be made only to those firms or individuals actually requiring funds in order to produce war supplies. It is thought that this loan is not different from others made by this corporation in so far as this requirement is concerned. However, the evidence taken before the conference of September 5, 1918, and the formal agreement made between the War Finance Corporation and the Rollin Chemical Co. (Inc.) dated September 30, 1918, both show that other matters were considered by the War Finance Corporation before the loan of \$800,000 was made. The War Finance Corporation did not overlook the question of ample security. It did not take a chance on the war's continuing for a period which would enable claimant to reap from war contracts profits sufficient to repay this \$800,000. The War Finance Corporation in making the loan

of \$800,000 secured mortgage bonds amounting to \$1,100,000 on claimant's plant which had cost approximately \$2,500,000; compelled claimant to insure the plant for \$1,200,000; and required it to assign to the War Finance Corporation as additional security certain insurance policies on the lives of Mr. Rollin, the president, and other employees of the company.

9. Considering all of the circumstances, including not only the conference of September 5, 1918, but also all negotiations between claimant and the Government prior thereto, this Board finds that there did not arise an implied agreement whereby the Government was to pay for any of claimant's facilities. The claim is therefore rejected in full.

DISPOSITION.

A final order denying relief will issue.

Lieut. Col. McKeeby and Capt. Morgan concurring for the appeal section; Col. Morrow concurring for the War Department Claims Board.

NOVEMBER 10, 1920.

Case No. 1933.

In re **CLAIM OF A. C. LAWRENCE LEATHER CO.**

- 1. FORMAL AND STATUTORY.**—When the claimant had a contract to ten Government-owned sheepskins and a price to be paid thereunder was fixed on an understanding that there was to be no delivery until required by the Government and that they might be stored for a reasonable time, the expense of storage and insurance to be borne by claimant even to the extent of storing the articles in a public warehouse if so requested by the Government, it was the duty of the claimant to hold the articles until delivery was ordered and there arose no liability on the Government to pay storage or insurance costs until a reasonable time after claimant had notified the Government and requested removal.
- 2. JURISDICTION.**—When the Government becomes obligated for storage and insurance after a reasonable length of time and when the reasonable length of time does not bring about that obligation prior to November 12, 1918, such obligation to pay does not come within the purview of the act of March 2, 1919, it is not within the jurisdiction of the Appeal Section to determine whether such an obligation arose after November 12, 1918.
- 3. CLAIM AND DECISION.**—Claim under act of March 2, 1919, for \$2,235.45 for storage and insurance. The claim was denied by the Board of Contract Adjustment in decision dated May 5, 1920. On reconsideration a new statement of facts and decision are written. Held, former decision affirmed and claimant not entitled to recover.

Capt. Taylor writing the opinion of the Board.

ON RECONSIDERATION.

The Board finds the following to be the facts:

1. This claim is presented as arising under the act of March 2, 1919, and is for \$2,235.45, based on an implied agreement for storage and insurance on Government-owned goods. The claim was first presented to the Claims Board, Office of the Director of Purchase, as a class A claim, but was forwarded to the Board of Contract Adjustment as a class B claim. The claim was decided on the record and without a hearing in an opinion dated May 5, 1920. In that decision the Board of Contract Adjustment denied claimant the relief prayed for, and the claimant asked for a hearing and reconsideration, which was granted. As a hearing has now been had and as the claim has been amended, an entire restatement of the facts and a new decision will be written.

2. On May 24, 1918, a proxy-signed contract No. 3449-B was entered into between Col. H. J. Hirsch, Q. M. C., U. S. A., acting by S. W. Shaffer, captain, Q. M. R. C., and the A. C. Lawrence Leather Co., of Boston, Mass., whereby the claimant agreed to tan at \$4.50 per dozen, f. o. b. contractor's tannery, all (not less than 100) fresh green, salted packer sheep skin and lamb skin shearling pelts of standard selection, No. 1 grade, having wool of three-eighths of an inch to 1 inch inclusive in length, which the quartermaster may furnish; deliveries to begin within 40 days after allotment of skins by the Government.

3. The contract also provided that the claimant should at the option of the Contracting Officer advance transportation charges on pelts shipped to it, transport all pelts from the cars to the tanneries, tan all pelts without unnecessary delay; exercise care and use best methods and materials available to the contractor in handling and tanning the articles so that same will be tanned and delivered by the contractor as perfectly tanned and in as perfect condition as possible; "pack or bale tanned articles with paper under covering and burlap outer covering in the manner customary in the domestic trade and deliver same to a carrier when and as directed by the Contracting Officer."

The above quoted provision appears in a sheet called "Schedule A" attached to and made a part of the contract.

4. Paragraph 6 of the regular printed form of the contract provides:

"6. *Storage and insurance.*—The contractor will, when requested by the Contracting Officer, store for a reasonable time a reasonable quantity of completed articles and exercise reasonable care to prevent loss or damage thereto or theft thereof, and will insure same and all material paid for or furnished by the Government under this contract while in the contractor's possession, against fire and water damage, in a company and under a policy satisfactory to the Contracting Officer, all at the risk and expense of the contractor."

5. The claimant performed this contract and tanned all pelts delivered to it by the Government and has received payment therefor, and is now asking for certain losses on account of storage and insurance charges on portions of the pelts tanned.

6. The claimant contends that under the contract the Government was to take delivery of the pelts as soon as the tanning process was finished, and that under paragraph 6 of the contract, quoted above, the claimant was not bound to furnish free storage and insurance to the Government for any length of time on undelivered tanned pelts, except upon request of the Government; that no such request was made by the Government, and therefore the claimant should be reimbursed for the loss it has suffered for storage and insurance on the tanned pelts which were inspected and accepted by the Government

but which the Government failed and refused to take delivery of, although repeatedly requested to do so by the claimant.

7. The claimant computes such loss in storage and insurance on 242,937 pounds of tanned pelts at the rate of four-tenths of 1 per cent per hundredweight from a certain date until they were delivered to the Government. The dates from which storage and insurance are reckoned are the dates when the various portions of this quantity were inspected and accepted by the Government inspector and invoiced by the claimant, the first date being October 11, 1918, and the last being January 29, 1919. The claimant started delivery to the Government of this quantity, under Government instructions, on February 6, 1919, and continued to make deliveries monthly until October 15, 1919, at which time the entire quantity had been delivered. The claimant is not asking reimbursement for any storage or insurance charges on goods delivered prior to October 11, 1918.

8. The goods were stored in the claimant's own tannery buildings; it paid no warehouse storage charges, but did pay insurance charges.

9. In its original claim the claimant allowed free storage charges to the Government for a reasonable length of time, which it estimated to be thirty (30) days from the time which quantity of pelts were tanned and inspected and ready for shipment. However, the present claim is amended so as not to make any such allowance, it being the contention of the claimant now that it was not bound to store or insure such undelivered pelts for any length of time free of charge to the Government, except as provided in paragraph 6, above quoted.

10. Mr. E. C. Shotwell, who was chief of the Sheepskin and Glove Leather Branch of the Hide and Leather Control Board of the Quartermaster General's Department, testified at the hearing on October 13, 1920, that the Government decided to purchase sheepskin shearlings in the raw state from the packers and other slaughterhouses during the spring of 1918, because it was the season when shearlings came on the market and not because the Government had any use for shearlings at that time. At a conference of tanners called by the witness on or about May 24, 1918, and prior to the Government's decision to purchase, at which was present Mr. W. R. Fisher, representing the claimant, and representatives of a number of other tanners, it was discussed that the following fall there might be a great need for wool sheepskins by the Government. At this conference bids of several tanners were discussed for tanning shearling sheepskins which the Government would furnish. These bids all showed a difference of from 50 cents to 75 cents per dozen less than the price stated in the contract. The claimant's bid was 75 cents less. These bids were all discussed and gone over, and it was stated that it was customary for the contractor to charge for burlap. The question of responsibility for damage to the shearlings after being tanned,

but still in the tanner's hands, was discussed, as was the question of storage and insurance. Mr. Shotwell states he told the tanners that the Government did not wish to make a contract for these various items separately, and explained to them that the Government was buying these shearlings not knowing for what purpose they would be used, and it was therefore important that it be thoroughly understood that the storage of these skins should be given consideration in fixing the price. It was also important that the price should cover responsibility on the part of the tanners to keep the shearlings free from moths and damage of all kinds, because the Government could not tell when it might take these goods out of the tanners' warehouses. However, it was expected that the Army would want the skins for the coming winter. After considerable discussion as to what should be paid to include the storage and other items mentioned it was agreed to make the price \$4.50 per dozen.

11. Mr. W. R. Fisher, assistant general manager of the claimant company, who was present at the conference of tanners with Mr. Shotwell, testified that none of the tanners at the conference submitted bids for tanning the Government-owned shearlings, and that the price of \$4.50 per dozen agreed upon included the cost of receipt and inspection by the tanners, the grading, tanning, and finishing, the clipping at the opinion of the Government of a certain percentage of the finished skins, grading of the finished leather, packing and shipment to the cars, but that it did not include storage and insurance charges. Mr. Fisher further testified that Mr. Shotwell did explain to the tanners that the Government did not know the specific uses for which the skins would be used, but did state positively that the skins would be wanted prior to November 1, 1918.

DECISION.

1. When this claim was first presented claimant admitted that it was under obligation to store and insure the finished articles for a reasonable length of time, and it contended that thirty (30) days was a reasonable length of time, but it now contends that as no request to store and insure was ever made, it was under no obligation to do so free of charge for any length of time, and that it is entitled to storage and insurance from the dates when the various lots were inspected and invoiced. However, claimant concedes that if the request to store and insure had been made, it would have been obligated to do so even to the extent of storing the articles in a public warehouse. This position is untenable; claimant suffered no loss by reason of the failure of the Government to make the request as provided in paragraph 6 of the contract. In fact claimant benefited by the failure of the Government to make the request. Claimant could have been required to pay storage in a public warehouse. Other contractors whose contracts were identical with this one did store the

finished articles in public warehouses for months free of charge, and they have made no claim similar to this one.

The act of March 2, 1919, authorizes the Secretary of War to adjust informal contracts "upon a fair and equitable basis." This means "fair and equitable" to both parties. It would be manifestly unfair to penalize the Government for failing to request claimant to store and insure articles when claimant was not injured thereby but was distinctly benefited.

2. We hold therefore that claimant was obligated to provide free storage and insurance for a reasonable length of time after the articles had been inspected and invoiced. It is unnecessary to decide what was a reasonable length of time, or whether the claimant was required to hold the goods longer than a reasonable length of time. The question before the Appeal Section is this: Did an implied agreement arise prior to November 12, 1918, between claimant and the United States by the terms of which the United States was obligated to reimburse claimant for storing and insuring Government-owned goods after claimant had done this free of charge for a reasonable length of time as required in the written contract? To answer this in the affirmative it is necessary to hold that the reasonable length of time expired before November 12, 1918. The first lot was invoiced October 11, 1918, and, accepting claimant's original interpretation of a reasonable length of time, 30 days, and applying to the earliest lot invoiced, the alleged implied obligation as to this one lot did not arise prior to November 12, 1918. It is therefore unnecessary to decide when the reasonable length of time did expire as to subsequent lots. If an implied obligation arose out of this transaction, as claimant insists, by reason of which claimant is entitled to reimbursement on a quantum meruit, such obligation did not arise prior to November 12, 1918, and it therefore does not come within the purview of the act of March 2, 1919.

It is not within the jurisdiction of the Appeal Section to determine whether or not an implied agreement arose after November 12, 1918. However, according to Mr. Shotwell's testimony it would seem that the price allowed the contractor was sufficient to cover the storage and insurance charges for the entire time the goods remained at claimant's plant.

3. For the reasons stated the decision of the Board of Contract Adjustment, dated May 5, 1920, denying relief is hereby affirmed and the relief asked for is hereby denied.

DISPOSITION.

The Appeal Section will enter a formal order denying relief. Lieut. Col. McKeeby and Lieut. Hendon concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

NOVEMBER 10, 1920.

Case No. 2639.

***In re* CLAIM OF SABULITE EXPLOSIVES (LTD.).**

1. CLAIM AND DECISION.—Facts are stated in decision denying relief because of lack of jurisdiction reported in Volume VII, page 80. On appeal, Secretary of War approves opinion of the Judge Advocate General reversing decision on jurisdiction and returned case for necessary action. Claimant is entitled to be reimbursed for demurrage paid under instructions from Government official on one car of amatol and one car of T. N. T. shipped from Sparta, Wis.

Maj. Hill writing the opinion of the Board.

ON RECONSIDERATION.

1. From the decision of the Board of Contract Adjustment, reported in Decisions, volume 7, denying relief, claimant appealed to the Secretary of War. The facts are fully stated in the decision.

2. This case was returned to this section by the Secretary of War, approving the opinion of the Judge Advocate General, and for necessary action in accordance therewith.

3. The opinion of the Judge Advocate General is as follows:

“1. By your memorandum of September 13, 1920, certain papers with reference to the claim of Sabulite Explosives, Ltd., are referred to this office for an opinion as to the method which can be adopted legally for the settlement of such cases as that of the claimant, and an opinion is desired as to the jurisdiction of the War Department Claims Board in this particular claim.

“2. It appears that about June, 1919, the claimant, Sabulite Explosives, Ltd., of Vancouver, Canada, entered into an agreement with the Government for the purchase from the Government, under the provisions of the Act of Congress of July 9, 1918 (40 Stat., 850), authorizing the sale of war supplies, material, and equipment, of certain Amatol and T. N. T. f. o. b. cars for shipment to claimant at Port Coquitlam, B. C., Canada, the bills of lading to have sight drafts attached addressed to Mr. W. W. Pierie, care of the Canadian Bank of Commerce, Vancouver, B. C. Two cars shipped from Sparta, Wisconsin, and containing the material so sold to the claimant arrived at Vancouver on October 4, 1919, with a charge thereon for demurrage of \$1,340 on account of said cars having been held by the United States Customs Department at Portal, North Dakota, for 71 days, this action being the result of the shipper not having furnished export declaration papers. On the day of arrival the

claimant wired the Secretary, Committee Sales of Material, Ordnance Department, Chicago, asking whether the claimant would be authorized to pay these charges on the Government's behalf in order to avoid further expense. Having been advised in reply to wire directly to the party from whom the purchase was made, on October 6, 1919, the claimant asked the Ordnance District Salvage Board, New York, whether that Board would clear the cars or whether the claimant should pay the demurrage charges and collect from the Board. In a reply telegram, dated October 7, 1919, the said Board advised that Captain Moody authorized the claimant to pay the demurrage. Relying on this last telegram, the demurrage was then paid by the claimant, and the present claim is for reimbursement for such payment. The Captain Moody referred to was attached to the Salvage Board Committee on Sales of Materials, Ordnance Department, Washington, D. C., and it was with him that the sale of said materials was negotiated.

"3. Sabulite Explosives, Ltd., submitted its claim to the War Department Claims Board, which on July 15, 1920, denied the claimant the relief sought on the ground that said Board was without authority to grant such relief. In its decision the Board said:

"It is the opinion of this Board that the Government has not fully complied with the terms of the contract, but has failed to furnish the proper clearance or export papers. The failure of the Government to furnish such clearance or export papers constitutes a breach of the contract whereby the demurrage charges paid by claimant accrued. The phrase "f. o. b. cars" in view of the construction placed upon the contract by the parties must in our opinion be interpreted to mean that the Government was obligated to provide the necessary export or clearance papers.

"No regulations covering the form of contracts for the sale of surplus property have been prescribed by the Chief of Ordnance pursuant to section 6854, Compiled Statutes. This contract is then not a contract, within the exceptions to section 3744, Revised Statutes, but is an informal contract.

"Payment by the Secretary of War of that part of the claim amounting to \$1,340.00 stated in subdivision c of paragraph 3, Findings of Fact, which was paid by claimant upon the faith of a telegram from Mr. Weiner, of the New York District Salvage Board, would amount to an adjustment of a claim for damages based upon a breach by the Government of an informal contract.

* * * * *

"It is the opinion of this Board that the Secretary of War has no authority to adjust a claim for damages based upon a breach by the Government of an informal contract not coming within the provisions of the Act of March 2, 1919."

"4. On transmitting the papers to the Assistant Secretary of War under date of September 10, 1920, the Vice Chairman of the War Department Claims Board said:

"The War Department Claims Board as it is at present constituted is without jurisdiction over this claim. We have consistently held that the Board was without jurisdiction over claims arising from the acts or omissions of the Sales Branch of the War Depart-

ment. It is obvious that such claims can not arise through the Dent Act, as they did not occur until long after the Armistice.'

"As viewed by this office, the question as to the jurisdiction of the War Department Claims Board in this case depends upon whether the claim is based upon a contractual obligation or not. By G. O. # 33, W. D., 1919, the War Department Claims Board was given jurisdiction over claims under sections 1 and 4 of the Dent Act. By G. O. # 40, W. D., 1920, Section I, the Board succeeded to the jurisdiction of the War Department Board of Contract Adjustment, whose duty was defined by G. O. # 103, W. D., 1918, Section IV, as follows:

"5. It shall be the duty of the Board to hear and determine all claims, doubts, or disputes, including all questions of performance or nonperformance which may arise under any contract made by the War Department.'

"The view taken by the Vice Chairman of the War Department Claims Board in respect of its jurisdiction was doubtless based on the belief that the claim of Sabulite Explosives, Ltd., is not supported by any contract that is enforceable against the United States; for he indicated that under his view relief could only be given by Congress. This was doubtless because the contract in question was not within the scope of the Dent Act and had not been executed in accordance with the requirements of R. S. 3744.

"5. The facts do not appear to support the conclusion that the provisions of R. S. 3744, unrelieved by the Dent Act, constitute a bar to awarding relief or a bar to the jurisdiction of the War Department Claims Board.

"The War Department undertook to and did deliver to the claimant the supplies agreed upon and has been paid the purchase price. In connection with the making of such delivery and before payment, the claimant contended that an expense which accrued as demurrage charges was an expense for which the United States was responsible, and that tender of the goods was legally insufficient as a performance of the contract of sale unless before delivery the United States freed the goods from the lien of these charges. The claimant, in effect, refused to take delivery unconditionally, but requested instructions from the officers representing the United States in making the sale as to whether he, the claimant, should pay the charges in order to prevent further expense to the United States consequent upon further delay in releasing the shipment. He received instruction from the Government's representative to pay the charges. In making such payment, therefore, in accordance with what purported to be the proper authority, the claimant's true legal character was that of agent of the United States, assuming that there was authority to request payment for account of the United States; and no want of authority appears to stand in the way, provided the demurrage charge was justly owing by the Government under the contract of sale. Under these conditions, we have no question of damages for a breach of the contract of sale. On the contrary, that contract has been fully performed, within the rule announced by the Supreme Court in *United States v. Andrews* (207 U. S., 229, 243), and its invalidity because of nonconformity with the requirements of Section 3744, Revised Statutes, has now become immaterial.

"6. The only question now pending appears to be whether the United States is obligated to repay the Sabulite Explosives, Ltd., moneys paid out and expended by it as agent of the United States upon the theory that a promise to repay these sums is implied in law from the request made and benefit received by the United States; the latter consisting of the enhancement in value of Government property by divesting a lien and of the collection of the purchase price for such property. In principle, this claim, unsupported, as it is by any formal written contract, stands upon the same footing as any claim for a *quantum meruit* or *quantum valebat*. That R. S. 3744 interposes no obstacle to paying such claims is entirely well settled. *Clark v. United States*, 95 U. S., 539. And it is, of course, immaterial on the question of liability that the Dent Act does not apply.

"7. Under the view taken by this office the claim should be considered upon its merits and decided by the War Department Claims Board.

"8. The foregoing views will apply to any other case involving substantially similar facts. In cases of claims for unliquidated damages predicated upon the breach of informal contracts not within the Dent Act there exists, however, no authority in the War Department to make settlement thereof.

"(Sgd.) E. H. CROWDER,
"Judge Advocate General."

4. By direction of the Secretary of War, the decision of the Board of Contract Adjustment, dated July 15, 1920, denying relief is hereby vacated and set aside.

5. In accordance with the opinion of the Judge Advocate General as approved by the Secretary of War, this section finds that claimant is entitled to reimbursement in such sum as was paid by it as demurrage charges on one car of amatol and one car of T. N. T. (Car Nos. MP 23464 and CP 208087) shipped from Sparta, Wis., and held at Portal, N. Dak., because of delay in receipt of proper export or clearance papers. No original evidence of the amount so paid was presented at the hearing before the Board of Contract Adjustment. Before payment is made, the exact amount so paid by claimant should be ascertained, in no event to exceed the amount claimed herein, \$1,340.

DISPOSITION.

The Appeal Section hereby transmits its decision to the Ordnance Section for appropriate action and recommends, in accordance with the opinion of the Judge Advocate General, that a certificate of fair value be issued.

Lieut. Col. McKeeby and Lieut. Tabb concurring for the Appeal Section; Col Morrow concurring for the War Department Claims Board.

NOVEMBER 12, 1920.

Case No. 3006.

In re **CLAIM OF MESTA MACHINE CO.**

1. INCREASE IN COST OF MANUFACTURE DUE TO CHANGE IN METHOD.—

Where the written contract incorporates Schedule A which specifies the physical properties of the forgings to be produced, but is silent as to the method to be employed to obtain those physical properties, and the contract also contains a provision for reimbursing the contractor for any increase in cost of manufacture due to changes in the specifications, and the contractor is forced to employ a more expensive method in manufacture than was contemplated at the time the contract was negotiated, such increase in cost of manufacture does not come within the provision of the contract relating to changes in specifications.

2. INCREASE IN COST OF MANUFACTURE DUE TO CHANGES IN SPECIFICATIONS.—

Where the written contract contains a provision for reimbursing the contractor for any increase in cost of manufacture due to change in specifications, and changes are made in specifications which increase the cost of manufacture, the contractor is entitled to reimbursement for such increased cost.

3. DAMAGES DUE TO SUSPENSION OF CONTRACT.—

Where the written contract contained a termination clause which permits the contractor to purchase, at a reduced price to be agreed upon, facilities furnished by the Government, and the Bureau Board makes an award in the nature of a rebate on the price to be paid for such facilities, as damages sustained by reason of the termination of the contract, such an award will not be disturbed in the absence of evidence that it is unfair.

4. CLASS "A" CLAIM ON APPEAL.—(1) As to increased cost of manufacture due to change in method there can be no recovery. (2) As to increased cost in manufacture due to change in specifications relief is granted. (3) The award of the Ordnance Section for damages due to suspension of the contract is reasonable and will not be disturbed.

Capt. Taylor writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from the award of the Ordnance Section, War Claims Board, on a Class "A" claim arising out of an informally executed contract.

2. By the terms of Ordnance Contract CF-420, dated January 11, 1918, signed in the name of Samuel McRoberts, Colonel, Ordnance, N. A., by C. N. Black, Lieutenant Colonel, Ordnance, N. A., the Mesta Machine Co. was to furnish the United States with 9,000 tons of

artillery forgings. The price varied from 10.8 cents per pound for the 155 m/m howitzer recuperators to 14.25 cents per pound for the 75 m/m gun recuperators. Only 155 m/m forgings were ordered. The contract was not actually signed by the claimant until March 21, 1918.

3. The contract made provision for increased facilities, as shown in Schedule "B," in the sum of \$592,429 to be paid for by the United States and to be purchased by the contractor not later than six months after the termination of the war at the price of \$242,458 (the estimated cost as of 1914, 40.8 per cent of the actual cost). Article IV, paragraph 5, further provided:

"5. In the event of the termination hereof the United States agrees to either complete the additional facilities and sell them to the Contractor, as specified above, or to restore the Contractor's plant as it was originally before alterations were made for the addition of the additional facilities."

By letter, dated July 31, 1918, signed by Ross R. Harrison, captain, Ordnance R. C., claimant was authorized to increase facilities for this contract to the total of \$1,004,728, which by letter of August 2, 1918, claimant agreed to purchase from the Government at 40.8 per cent of cost upon completion of the contract.

On June 5, 1918, certain changes were made in the specifications which will be hereinafter referred to. A first supplemental agreement, dated August 16, 1918, was prepared and sent to claimant, which made provision for reimbursing claimant for increased facilities up to \$1,004,728, and also made provision for claimant to repurchase same, but claimant refused to sign this contract because it objected to Article IV thereof, which was as follows:

"the Contractor shall heat-treat the forgings contracted for without cost to the United States and in accordance with the directions of the Chief of Ordnance."

There was a second supplemental agreement, providing for additional increased facilities in the nature of a water main at a cost not to exceed \$20,000, which claimant was to purchase at 40.8 per cent of the cost upon completion of the contract. This supplemental agreement was never executed by either party.

4. Claimant accepted suspension of the contract on December 23, 1918; at that time the unfilled portion of the contract amounted to about 1,200 tons. All forgings delivered have been paid for at the contract price.

5. The following is a summary of claimant's revised claim and the award of the Ordnance Section, War Department Claims Board:

	Revised claim.	Recommen- dation.
A. Unworked direct materials.....	\$96,923. 79	\$96,923. 79
B. Worked direct material.....	10,480. 54	10,480. 54
C. Direct labor and overhead.....	8,131. 16	8,131. 16
D. Experimental work.....	16,544. 32	15,225. 48
E. Heat treatment.....	100,509. 17	.....
F. Additional furnace time.....	108,744. 05	.....
G. Damages due to cancellation.....	75,000. 00	.....
H. Loss due to change in method of testing.....	76,319. 98	.....
I. Suspended voucher.....	.....	330. 09
	492,653. 01	131,091. 06
Deductions:		
(a) Salvage offer. (Items a and b).....	56,723. 89	56,723. 89
(b) Purchase of facilities. (Item g is asserted as a deduction from offer).....	403,671. 81	346,352. 44
	32,257. 31	271,985. 27

Only those items which are in dispute will be discussed. The items of the award which claimant accepted will not be disturbed.

6. *Item E—Heat treating and testing—*

14,721,264 pounds, at 65 cents per hundredweight.....	\$95,688. 21
Carnegie Steel Co. bill (original).....	4,820. 96
Carnegie Steel Co. bill (additional).....	6,371. 04
	106,880. 21

The additional Carnegie Steel Co. bill was not presented to the Ordnance Section; claimant explains that this was an oversight.

The above item was disallowed by the Ordnance Section. Claimant insists that the full amount thereof should be allowed. It is proper at this time to quote the provisions of the contract which are pertinent to this item.

“ARTICLE I. The contractor agrees to make for and sell to the United States the articles listed below, hereinafter called ‘the articles,’ in accordance with the drawings and specifications hereto attached, marked Schedule A, and made a part hereof, together with such changes as may be made therein as hereinafter provided, and the United States agrees to purchase the articles and to pay therefor, all upon the terms and conditions set forth in the contract.

“ARTICLES CONTRACTED FOR.

“Nine thousand (9,000) tons of Artillery Forgings.

* * * * *

“Schedule A.

“(1) Manufacture must be in accordance with General Specifications Governing the Manufacture of Gun Carriages, Artillery Vehicles, and Similar Ordnance Material, as contained in the pamphlet entitled ‘Instructions to Bidders and General Specifications Governing the Manufacture and inspection of Gun Carriages, Artillery

Vehicles, and Similar Ordnance Material, Form 434, revised March 15, 1917, attached hereto and forming a part of this contract.

"(2) It is understood that in the event that the Contracting Officer shall specify that any part or all of the tonnage on this contract shall be assigned to the recuperator forgings for the 155 mm. Howitzer, 72 mm. Gun or 4.7" Guns will be made in accordance with the following Ordnance Office drawings:

Class.	Division.	Drawing.	Date or last revised.
3	41	151	Nov. 28, 1917
2	81	64	
3	16	128	Dec. 7, 1917

"(3) The forgings are to be made of acid open-hearth steel to show the following physical properties from test piece taken transversely from locations indicated on the drawing:

Tensile Strength, 80,000 lbs. per sq. in.

Elastic limit, 42,000 " " " "

Elongation in 2", 12%.

Contraction of area, 20%.

"To obtain the above physical properties, a carbon steel is to be employed which is to contain no nickel or chromium.

"(4) It is understood that if practice and experience indicate that the pieces can be forged to more economical sections than those shown on drawings, the Contractor will exercise his best efforts to obtain those sections.

"ARTICLE III. (Paragraph 2 only is pertinent.)

"2. It is agreed that the Contracting Officer may, by written notice to the Contractor, make changes in drawings and specifications forming part of this contract, and if such changes involve a substantial increase in the cost of manufacture of the articles a fair addition shall be made to the purchase price; but if such changes involve a substantial decrease in the cost of manufacture of the articles a fair deduction shall be made therefrom, all as shall be determined by the Contracting Officer."

Claimant insists that the contract price was based on forgings made from plain carbon steel by the open-hearth method, annealed to take out the forging strain, and that the price did not cover the cost of heat treating and water quenching, a method which it was later found necessary to resort to. Claimant alleges that it understood at the time the contract was negotiated that heat treating would not be permitted. The record shows that negotiations for the contract were begun with claimant by officers of the Artillery Section of the Ordnance Department in the latter part of 1917. When Mr. George Mesta and Mr. J. C. Drain, president and consulting engineer, respectively, of claimant company, were advised by the Ordnance officers of the physical properties required, Mr. Drain replied that it could not be done by the ordinary practice of annealing carbon steel, which required a heat of about ten (10) hours. They were advised that the French were doing

it, and Mr. Mesta finally decided his company could do anything that the French could do. The schedule of prices was prepared and the written contract was drawn up, dated January 11, 1918, and was forwarded to claimant. Experiments were conducted by claimant for several weeks in an effort to meet the specifications of Schedule A by the ordinary open-hearth process. These experiments proved unsuccessful, and finally a French metallurgist was brought over to show claimant how it was done, and he conducted an experiment at claimant's plant. This experiment was a total failure. On February 7, 1918, claimant's representative, Mr. Drain, attended a conference in Washington at the request of officers of the Artillery Section, and various methods of obtaining satisfactory results were discussed. This conference resulted in claimant being instructed to get results by any method it could. Claimant continued to conduct experiments and finally succeeded in getting satisfactory results by the heat-treating and water-quenching process, and so informed the Ordnance Department about March 23, 1918.

Claimant did not have the facilities to heat-treat and water-quench the forgings, and for a time this was done by the Carnegie Steel Co. Claimant alleges it has paid the Carnegie Steel Co. for this work \$11,192, and is asking to be reimbursed that sum and 65 cents per hundredweight for all the forgings which were heat treated in its own plant. This claim is made on the theory that the heat-treating and water-quenching process was an extra cost which was not contemplated at the time the price was fixed in the contract, nor according to the method which claimant was given to understand would be employed at the time the contract was negotiated. In support of this contention Mr. Mesta calls attention to the fact that no provision was made for heat-treating and water-quenching facilities at the time the contract was drawn, although his plant did not have these facilities, and that later provisions were made, which, among other things, provided for additional facilities for this purpose. Mr. Mesta also testified that when he executed the formal contract March 21, 1918, he knew that the heat-treating process was more expensive than was contemplated at the time the contract was prepared, and that he asked Col. C. N. Black, of the Contract Section, Procurement Division, who signed the contract on behalf of Col. McRoberts, to insert a clause in the contract to cover the increased cost due to heat treating and also due to the additional time required in the furnace (Item F), and that Col. Black referred him to Article III, paragraph 2, of the contract and told him that "the contract provided for that." (Record, p. 27.) Mr. Mesta then signed the contract.

7. *Item F—Additional time in furnace, 13 hours and 37 minutes instead of 10 hours and 40 minutes normal time, 15,534,864 pounds at 70*

cents per hundredweight, \$108,744.05.—This item was disallowed by the Ordnance Claims Board. The basis of this claim is the same as with reference to Item E above. All of the recital of facts relative to Item E are equally true with reference to this item. Mr. Mesta insists that at the time the contract was negotiated he understood that the specifications could be met by the ordinary, open-hearth process of making carbon steel. Claimant alleges that by the ordinary process a heat requires 10 hours and 40 minutes, but that as a result of its experiments on this contract it found that a longer time was necessary in order to obtain steel which, after the heat treating and water quenching, would meet the specifications. The average time required on the 389 heats for the forgings produced under this contract was 13 hours and 37 minutes. The first heats were much longer, but by experience the time was reduced. The cost due to the additional time required is placed at 70 cents per hundredweight, which represents what claimant could have realized on 4,648 tons of steel which could have been made in the ordinary way during this extra time. (Record, p. 87.)

8. *Item G—Damages due to the suspension of the contract, \$75,000.*—The Ordnance Section reduced the price of the facilities which claimant was to purchase by \$57,319.37 and consider this as an award applicable to this item of the claim. Claimant asks for the full amount, or an additional \$17,680.83.

Claimant declined to dismantle and arrange a portion of its plant for the purpose of taking on this contract unless protected in the event of the contract being terminated before completion. Accordingly the following provisions were made in the written contract.

“ARTICLE IV.

“4. Six months after the receipt of written offer of sale from the Chief of Ordnance, but not later than six months after the termination of the war between the United States and the Imperial German Government or its allies, the Contractor agrees to purchase and the United States agrees to sell the additional facilities called for in this contract belonging to the United States at a price of \$242,458.00. In any event, however, the Contractor shall not be required to pay for such facilities prior to December 31, 1918.

“5. In the event of the termination hereof, the United States agrees to either complete the additional facilities and sell them to the Contractor, as specified above, or to restore the Contractor's plant as it was originally before alterations were made for the addition of the additional facilities.

“ARTICLE VII, PARAGRAPH 3.

“3. It is further agreed that the United States may accept, in full satisfaction of this contract, such lesser quantities of the articles

herein contracted for as the Contracting Officer may designate; but in this case the Contractor's obligation to purchase additional facilities at the price specified shall cease, unless the United States place orders with the Contractor for other articles that can be produced by these facilities equal in value to the value of the portion of the contract canceled."

Claimant insisted that by reason of the suspension of the contract before completion it was deprived of the profits it would have made on the uncompleted portion of the contract, and that having arranged its plant for this contract, which included the removal and rebuilding of two furnaces, it was also deprived of the profits it would have made if it had not taken this contract. Over 16,000 tons of steel could have been made from the two furnaces which were removed, from the time they were removed until the new one was in operation, had they not been removed to make room for the forge plant for this contract. (Record, p. 104). Mr. Mesta testified that the profits his company would have made on these two dismantled furnaces during the period it would have required to complete the suspended portion of this contract would have amounted to \$84,000. (Record, p. 114.)

The record shows that claimant was behind on its schedule of deliveries. According to the original schedule deliveries were to begin in January, 1918, and to be completed in June, 1918. Owing to the difficulties experienced in the manufacturing process and inadequate facilities for heat treating and water quenching claimant was unable to meet this schedule, so a new schedule was made at claimant's request. By this schedule deliveries were to be completed by November 30, 1918. If deliveries had been made according to this schedule the contract would have been completed, and there would have been no suspension nor damage to claimant due to suspension. Mr. Mesta insists that the delay in deliveries on the revised schedule was not due to any fault on the part of his company but due to inability to get the necessary facilities installed on time.

9. *Item H—Additional length required for longitudinal test, \$76,319.98.*—Schedule A of the written contract referred to Ordnance Office Drawing No. 151, last revised November 28, 1917. This drawing showed that a test piece of two inches was to be taken from each end of the forging. The drawing also contained this provision:

"When forged in multiple lengths take one test bar from between each two sleighs."

Mr. Mesta testified that when the price of the forgings was agreed upon this drawing was submitted to him and Mr. Drain, and that in estimating the contract price the length of the test piece was taken into consideration. He also testified that forging in multiple lengths was permitted and was practiced for some time, but found impracticable and abandoned, but that in practice a test piece of 2 inches

was taken from only one end of the forging. On June 5, 1918, certain changes were made in the specifications and a new drawing was made a part of the specifications. This drawing, as last revised on May 25, 1918, required a longitudinal test piece of 6 inches, which makes an increase of 4 inches more than was allowed according to practice under the original drawing. Mr. Mesta estimates the cost due to the increase in the amount of material which went into the test piece under the revised drawings at \$76,319.98, after making proper allowance for the salvage value of the test pieces. It was because of this change in the specifications that claimant refused to execute the first supplemental agreement, dated August 16, 1918, as well as because of the additional cost due to heat treating the forgings.

DECISION.

1. *Items E and F.*

Heat treating and testing-----	\$106, 880. 21
Additional time in furnace-----	108, 744. 05

Claimant does not insist that any verbal or written promise was made by any representative of the Secretary of War that the increased cost represented by the above items would be added to the contract price, but relies upon Article III, paragraph 2, as the provision in the written contract which authorizes reimbursement for these two items of the claim. By the terms of the written contract claimant obligated itself to furnish forgings of the physical properties set out in Schedule A. The method to be employed in order to obtain these physical properties is not mentioned in the written contract nor in the specifications. At the time the contract was negotiated claimant well knew that forgings could not be made which would meet these specifications according to the ordinary process. It refused to execute the contract until March 21, 1918, for this reason. At that time it knew what process was necessary in order to obtain forgings which would meet the specifications. It knew that this process was more expensive than the ordinary process which it was contemplated could be used at the time the contract was negotiated.

There were no changes in the specifications with reference to the method to be employed to make forgings which would comply with the specifications. Claimant was at liberty to employ any method it could which would produce satisfactory results. If claimant had discovered a process which was much cheaper than the ordinary process, the United States could not make a claim for reduction in the contract price commensurate with the decrease in the cost of production. Paragraph 2 of Article III refers to changes in specifications. There were no changes in specifications with reference to the method to be employed to get satisfactory forgings.

There is no more foundation for allowing these two items to claimant than there is for the United States to now assert that the cost of manufacture was less than the negotiating officers thought it would be at the time the contract was negotiated. The Pittsburgh District Staff Auditor's report shows that the actual cost of producing the forgings was a little over 8 cents per pound. Claimant does not agree that this is correct, but if it is, it shows that the contractor made a profit of about 20 per cent on the forgings delivered. The United States can not now insist that the price was greater than it should have been. Neither can the contractor insist that the cost was more than it anticipated when there was not, as to these two items, any change in the specifications which increased the cost.

For the reasons stated, therefore, the action of the Ordnance Section in denying any relief on these two items is affirmed.

2. *Item G—Damages due to cancellation of the contract, \$75,000.*—The Ordnance Claims Board allowed \$57,319.87 of this amount by reducing the price to be paid by claimant for the buildings by that amount. Claimant insists upon the full amount. In the opinion of the Appeal Section the evidence is not sufficient to justify any increase in the allowance made by the Ordnance Claims Board.

3. *Item H—Additional length required for longitudinal test, \$76,319.98.*—Clearly this item of the claim comes within the provision of Article III, paragraph 2, of the written contract. By the change in the specifications, with reference to the length of the test piece, there can be no question but that the cost of the manufacture was thereby increased. The original drawing, dated November 28, 1917, required the contractor to furnish a test piece from each end 2 inches in length. The fact that in process a test piece of only 2 inches in length from one end was used in testing did not alter the obligation of the contractor to furnish two pieces each 2 inches long. By the change in the specifications, dated June 5, 1918, the drawing, dated May 25, 1918, required the contractor to furnish a longitudinal test piece of 6 inches in length. The contractor was thus required to furnish a test piece 2 inches longer than it was required to furnish under the original specifications. Claimant is asking for increased cost based on an increase of 4 inches. This is an error; the increase was only 2 inches. The contractor should be reimbursed as provided in Article III, paragraph 2, by reason of this change in the specifications. The Appeal Section declines to adopt the figures of the claimant with reference to this increase in cost. The Ordnance Section should investigate and determine the amount properly due the claimant by reason of this increased cost and make an award accordingly. The basis of computation should be the difference between 4 inches taken from the forgings transversely and 6 inches

taken longitudinally. The other changes made in the specifications, June 5, 1918, did not decrease the cost of production but only decreased the number of rejections.

DISPOSITION.

A copy of this decision will be transmitted to the Ordnance Section, War Department Claims Board, for appropriate action.

Lieut. Col. McKeeby, Maj. Hill, and Lieut. Hendon concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

NOVEMBER 15, 1920.

Case No. 3024.

In re CLAIM OF DUESENBERG MOTOR CORPORATION.

1. **CONSIDERATION.**—Authorization by an engineering representative and contracting agent under a formal cost-plus contract to pay labor at a rate higher than that which the contract states shall not be exceeded is without authority and not binding upon the United States.

Maj. Hill writing the opinion of the Board.

This is an appeal from the action of the Air Service Section in disapproving in a termination contract of a formal contract an item of \$1,019.87, representing wages paid in excess of that stipulated in the contract.

FINDINGS OF FACT.

1. Under date of July 17, 1919, claimant entered into a formal contract for the construction of five (5) King airplane engines on a cost-plus basis.

2. Article II of the contract provided as follows:

“That for the intents and purposes of this agreement the said Charles B. King shall be considered the engineering representative of the Airplane Engineering Department and also its contracting agent, under this contract, to the extent of giving instructions, directions, and orders to the said Duesenberg Company to buy material, perform labor at its shop, or arrange to have labor performed elsewhere necessary to the fulfillment of the construction work contemplated herein.”

3. Article IV of the contract stated the items of cost for which the United States would reimburse the contractor, of which section 5 is as follows:

“5. A profit of five per cent (5%) shall be allowed the Duesenberg Company upon labor authorized by the Contracting Officer to be performed in outside manufactories upon all articles delivered to and accepted by the Government, the labor charge not to exceed the following rates:

Straight time	-----	\$1. 40 per hr.
Overtime	-----	2. 10 “ “
Double time	-----	2. 10 “ “

4. Mr. King was stationed at the plant of Brewster & Co., a subcontractor of claimant. In August, 1918 the Brewster Co., found

it necessary, because of competition for labor, to increase the labor rate for straight time by ten per cent (10%) over that allowed by contract, from \$1.40 to \$1.54 per hour. Mr. King instructed claimant to issue purchase orders covering this increase in labor rate and authorized claimant to pay for this labor \$1.54 per hour. Mr. King, on October 30, 1918, requested the Air Service Engineering Department at Dayton to issue a supplementary contract authorizing the payment of \$1.54 per hour after August 13, 1918. This request was disapproved.

5. Under date of July 17, 1919, a termination contract was executed providing in part for the payment to claimant of \$514.59 in full settlement under this contract, making the total payment received by claimant \$50,256.32. This amount included reimbursement for expenditures made by claimant at the rate of \$1.54 per hour.

6. This termination contract required the approval of the Claims Board, Air Service, before it could become a valid and binding obligation. The Air Service Claims Board declined to approve this termination contract and found that claimant was indebted to the United States in the sum of \$1,019.87, the amount which claimant had been reimbursed for labor paid at \$1.54 instead of \$1.40 per hour.

7. Claimant contends that inasmuch as its obligation under the contract was to follow the instructions of Mr. King, it had no alternative but to pay such labor rates as he might instruct it to pay.

DECISION.

1. Article IV expressly states that the labor charge for straight time shall not exceed \$1.40 per hour. With this positive prohibition expressly stated in the contract Mr. King was without authority to authorize the payment of straight time in excess of \$1.40 per hour. Such an authorization would amount to an agreement to pay a sum in excess of that stipulated in the contract and would be without consideration and not binding upon the United States.

2. It is the opinion of this section that claimant was not entitled to payment of straight time for labor at a rate in excess of \$1.40 per hour. The action of the Air Service Section in disapproving the item representing payment in excess of that amount is approved.

DISPOSITION.

The Appeal Section transmits its decision to the Air Service Section for necessary action.

Lieut. Col. McKeeby and Lieut. Tabb concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

NOVEMBER 15, 1920.

Case No. 2999.

***In re* CLAIM OF WOOD ART MACHINE CO.**

- 1. INCREASED FACILITIES.**—Where claimant without direction from some Government agent increases its facilities upon the assumption that it will receive future orders, it does so at its own risk and the Government is not obligated to reimburse it for such expenditures.

Maj. Hill writing the opinion of the Board.

This claim arises under the act of March 2, 1919, and was filed as a Class A claim on June 17, 1919, with the Ordnance Section, War Department Claims Board. Statement of claim Class B has been presented for the sum of \$96,486.38 by reason of an alleged informal agreement between claimant and Capt. Harold B. Johnson, assistant head of the Small Arms Section, Procurement Division, Ordnance Department, United States Army, for increased facilities and additional orders for finished rifle stocks, 1917 model.

FINDINGS OF FACT.

1. On July 2, 1918, claimant was given Procurement Order No. P-11220-1973-Sa "to kiln-dry and manufacture into finished stocks for United States rifle, Model of 1917, one hundred thousand (100,000) walnut or birch gunstock blanks." The Wood Art Machine Co. proceeded to manufacture under this order up until the signing of the armistice, at which time all work was suspended. Later a Class A claim was filed with the Ordnance Department and a settlement made thereunder.

2. In its Class A claim filed with the Ordnance Department, claimant included a claim for certain increased facilities over and beyond those necessary for the performance of the procurement order for one hundred thousand (100,000) gunstocks. This claim for facilities was separated and presented to this section as a Class B claim.

3. It is alleged by claimant that during the negotiations for the one hundred thousand (100,000) stocks which were manufactured under the procurement order of July 3, 1918, Capt. Harold B. Johnson promised that this order for one hundred thousand (100,000) would be only the beginning of many orders to follow; that the price at which the procurement order was taken was arrived at by claimant

upon the promise that it would receive contracts for at least one million (1,000,000) gun stocks; that upon the strength of the promises received from Capt. Johnson that claimant would receive continuous orders for these stocks claimant greatly increased its facilities, such as making new machines, rearranging its plant, and assuming additional financial obligations.

4. The claimant's representative, Mr. Stephen Robinson, jr., secretary of the Wood Art Machine Co., testified that Capt. Johnson told him that if the one hundred thousand (100,000) stocks to be manufactured under the procurement order were satisfactory, there would be "a continuous contract during the period of the war or the period of our requirements."

5. Mr. James F. McCloskey, vice president and superintendent of the Wood Art Machine Co.'s factory, and Mr. Wadsworth Cresse, treasurer of claimant company, both testified that the Wood Art Machine Co. had expended a great deal of money in the rearrangement of its plant and the obtaining of new machinery upon the promises of Capt. Johnson, made to Mr. Robinson, that they would receive future contracts, provided the stocks produced under the procurement order were satisfactory.

6. Mr. H. B. Johnson, the Capt. Johnson referred to by claimant, testified that he told Mr. Robinson, claimant's representative, that "I would give him a trial order of one hundred thousand (100,000) stocks, which, if he produced them successfully, would be greatly increased. This order for one hundred thousand (100,000) stocks was really a trial order and to determine to our satisfaction that they could produce a satisfactory stock."

7. Later, Capt. Johnson testified:

"Lt. TABB. Captain, in giving this order for one hundred thousand (100,000) stocks at \$1.90, I think it was, per stock, did you take into consideration, or was it taken into consideration, that they would have to make these changes and expenditures?"

"Mr. JOHNSON. Yes, sir; absolutely."

"Lt. TABB. It was taken into consideration in giving the order for one hundred thousand (100,000)?"

"Mr. JOHNSON. Absolutely."

"Lt. TABB. And that price was based on the changes that they would have to make?"

"Mr. JOHNSON. Absolutely. They were willing to gamble on their ability to produce these stocks in a satisfactory manner, and this price of \$1.90 per stock, we understood, would not see them through on the first order, but if they made good it would see them through on the balance which we intended to give them."

DECISION.

1. This section is of the opinion that no definite order was given to the Wood Art Machine Co. other than the procurement order for one hundred thousand (100,000) gun stocks, nor was it authorized to increase its facilities in anticipation of further orders.

2. It is the opinion of this section that the increased facilities were established and obtained without authority or instruction from the Government or any of its agents; that the claimant assumed a business risk in the making of such expenditures, and that there is no obligation upon the part of the Government to reimburse the claimant for the expenditures so incurred.

The claim is accordingly denied.

DISPOSITION.

A final order denying relief will issue.

Lieut. Col. McKeeby and Lieut. Tabb concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

NOVEMBER 16, 1920.

Case No. 2859.

In re CLAIM OF LOUISIANA RAILWAY & NAVIGATION CO.

1. **INFORMAL AGREEMENT.**—Where a Constructing Quartermaster instructs a railroad company to furnish material and labor for certain additions and betterments in accordance with a previous informal written understanding that the company would be reimbursed for expenses incurred in said work, and the company thereafter constructs additions and betterments, the Government is obligated under the act of March 2, 1919, to pay claimant for such additions and betterments constructed on the Government reservation.
2. **JURISDICTION.**—The Secretary of War is without authority to adjust an informal agreement entered into after November 11, 1918.
3. **CLAIM AND DECISION.**—Claim for \$24,416.80, under the act of March 2, 1919, for additions and betterments alleged to have been constructed on a Government reservation under an informal agreement. Held, claimant is entitled to recover on five items of the claim but is not entitled to recover for the expense of constructing a depot since the informal agreement did not include the construction of a depot; the Secretary of War is without jurisdiction to adjust this, the sixth item of the claim.

Maj. Miller writing the opinion of the Board.

FINDINGS OF FACT AND DECISION.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, for \$24,416.80, has been filed under Supply Circular No. 17, Purchase, Storage and Traffic Division, General Staff, 1919, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The detailed statement of claim covers the following six items:

<i>Item No. 1</i> (Claimant's No. 1306)—Balance due on track material other than ties-----	\$1,401.34
<i>Item No. 2</i> (Claimant's No. 1306-A)—Balance due for ties-----	5,559.42
<i>Item No. 3</i> (Claimant's No. 1306-B)—Cost of labor in construction of tracks-----	6,310.40
<i>Item No. 4</i> (Claimant's No. 1306-C)—Cost of dirt, rock, and cinder ballast, including operation of steam shovel--	3,185.65

<i>Item No. 5</i> (Claimant's No. 1306-D)—Labor and material devoted to construction of telephone line-----		\$631.95
<i>Item No. 6</i> (Claimant's No. 1306-E)—Labor and material used in construction of depot-----		7,328.04
Total-----		24,416.80

3. This claim was presented to the Claims Board, Transportation Service. Under date of June 19, 1920, that Board rejected the claim in full because the claimant had failed to furnish evidence sufficient to show whether the items of the claim had been previously paid. An appeal was taken to the Appeal Section, War Department Claims Board, where considerable new evidence was introduced by both the claimant and the Government at a formal hearing conducted before a committee of the Appeal Section. By agreement of counsel for claimant and the Government, an affidavit of Col. Evan Shelby and answers to interrogatories propounded to Mr. J. W. Alexander were added to the record following the formal hearing.

4. In the summer of 1917 Camp Beauregard, La., a National Guard cantonment, located about 5 miles from Alexandria, La., was in the course of construction under the direction and supervision of Maj. Arthur M. Shaw, constructing quartermaster. A number of railroads entered the city of Alexandria, but none of them ran sufficiently near Camp Beauregard to serve its requirements. To remedy this obvious need conferences were held on July 16 and 20, 1917, between officials of the War Department and representatives of the several railroads operating within the vicinity. As a result of these meetings, the Louisiana & Arkansas Railroad was selected by resolution to furnish the needed railroad facilities, but this railroad was unable to undertake the work, and an appeal was then made to the Louisiana Railway & Navigation Co. to connect its line with the camp. The claimant undertook to do this, and on July 27, 1917, addressed a letter to Maj. A. M. Shaw, then constructing quartermaster at Camp Beauregard, La., confirming an oral conversation relative to the agreement. This letter is quoted, in part, as follows:

"We would propose to build the necessary tracks from a connection with the Louisiana & Arkansas Railroad to the Camp Grounds (approximately one mile and a half) and all of the lead and switch tracks within the camp grounds (approximately four miles) or relay the track of the Lee Lumber Company, as you may elect, if requested by your department. Upon completion of this work, operation of the line, including all tracks within the camp grounds, to be performed by our road, both freight and passenger, at rates reasonably compensatory for the service performed and facilities used.

"For this work and the work above referred to, we shall expect to be reimbursed for such amounts paid out."

On August 1, 1917, the constructing quartermaster confirmed the company's letter in a communication from which the following is quoted:

"This will acknowledge receipt of your proposal covering the furnishing of trackage for temporary connection with Camp Beauregard, and also for the permanent service which you propose to install.

"Your understanding, as stipulated in your letter above referred to, corresponds with the verbal understanding of the 26th ult., excepting that the arrangements should be left open in so far as it refers to the switching operations within the new yards which are to be constructed."

In order to make a permanent record of the agreement between the constructing quartermaster and the claimant, Maj. Shaw prepared a memorandum under date of August 8, 1917, from which the following is taken as applying to this claim:

"5. At a conference with the officials of the L. R. & N. R. R., the following more permanent plan was agreed upon and is being carried out:

* * * * *

"(b) For a permanent service, the L. R. & N. has agreed to undertake the construction, at the expense of the United States, of a cut-off connection from Point 'A' to 'B' as shown as a part of Route No. 3, on the accompanying sketch, and construction of this cut-off has already been started. It will be about two and a half (2½) miles long with 1% maximum grade and 5 degrees maximum curves. Heaviest cutting is 13 feet. No streams of importance are crossed.

"6. The cut-off from 'A' to 'B' is all, or practically all, within the limits covered by leases already secured by the local committee, which has stated that if any part is involved which has not already been secured, it will be included without delay.

"7. The construction of the cut-off is to be carried out under the following plan:

"(a) All construction material to be furnished by the United States.

"(b) The culvert construction, grading of roadway and track construction to be done by the L. R. & N. for which they will be reimbursed for the actual cost to them.

"8. It is expected, though not definitely agreed upon, that all track construction for terminals will be done by the L. R. & N. at cost plus a profit to them not to exceed 10% of cost."

5. The record shows that when the first work was done the Government furnished the material used in the construction of tracks. However, in building additions and betterments, both material and labor were furnished by the railroad. This claim covers only additions and betterments constructed by the railroad company on the Government reservation, no claim being submitted for any construction work done off the reservation.

6. Maj. A. M. Shaw testified that these additions and betterments, with the possible exception of the depot, were constructed under the

terms of the original agreement, supplemented by certain instructions of the constructing quartermaster.

7. At the hearing the question arose as to whether claimant in accepting a voucher for \$8,889.20 had agreed to accept that amount as payment in full. The record clearly shows that this amount was not accepted as payment in full of the original claim of \$35,000. A memorandum signed by Maj. J. J. McConnell, who succeeded Maj. Shaw as constructing quartermaster at Camp Beauregard, La., states that "the claimant agrees to accept \$8,889.20 without prejudice to his rights to file claim for the disputed balance deducted by the Government auditors." Capt. Ira J. Hooks, who succeeded Maj. McConnell as constructing quartermaster at Camp Beauregard, testified at the hearing that it was clearly understood by himself and claimant that the payment of \$8,889.20 was not accepted by claimant as settlement of this claim in full. None of the items of this claim have been paid.

8. Claimant had not filed a claim covering the items herein involved until a conference of War Department and railroad officials had been held at Alexandria, La., January 21, 1919, to discuss the question of freight rates that should be paid this company. This conference was attended by officials of the United States Railroad Administration and of the Construction Division, Zone Finance Office, and Inland Traffic Service of the War Department. After investigating the matter by a personal visit to Camp Beauregard this conference made certain reductions in the freight rates charged by the claimant and recommended that the claimant submit to the War Department a claim for items of expense involving additions and betterments. It appears that the claimant had originally fixed the freight rates on a basis that would cover the expenditures known in railway parlance as "additions and betterments." At the request of the members of this conference, the claimant accepted the reduction in freight rates and submitted its claim as set forth herein to the War Department. Maj. Shaw, a member of this conference, has submitted the following statement concerning the action taken by the conference relative to additions and betterments:

"After giving consideration to the matter presented by the L. R. & N. Co., it was the opinion of the Board that the commodity rates should be readjusted downward, a substantial cut being made in the rates for coal and gravel, but as a partial offset to this reduction in revenue, the L. R. & N. Co. was advised that they should render a bill through usual channels and secure reimbursement for all construction work done on the property then under control of the Government, the telephone line and the depot at the camp being specifically mentioned as forming such items."

Col. Evan Shelby, chief of the Contract Branch of the Construction Division, who was a member of this conference, has furnished

this Board with a sworn statement, which is quoted, in part, as follows:

"In the general discussion the representatives of the Louisiana Railway & Navigation Company asked that the rates be so fixed that the company would be reimbursed for its additions and betterments in connection with Camp Beauregard or that the Company should be reimbursed directly for the construction done within the confines of the Camp and that the other extraordinary expenses incurred in connection with additions for serving Camp Beauregard should be taken into consideration in fixing the final rate to be allowed by the Government.

"At that time there were large outstanding bills to be adjusted for freight service rendered the Government. The final conclusion reached and the freight rates agreed upon were based upon the assumption that the Government would pay the Company for the facilities constructed upon the reservation by the Company, and that the Government would own such facilities. It appeared at the conference that these facilities were furnished by the Louisiana Railway & Navigation Company at the instance of the War Department authorities and after other railroad companies had declined to furnish the same."

9. Under date of May 22, 1919, the Government sold to J. W. Alexander et al., of Alexandria, La., the buildings and fixtures therein, all electric, water, sewer and sewage disposal systems, and other accessories; all railroad tracks, roads, culverts, bridges, and other accessories located on the camp site known as Camp Beauregard, except those buildings contained within a shaded area shown on the map and any buildings on the camp site not owned by the Government. These purchasers transferred this property to the Beauregard Development Co. (Inc.). On November 28, 1919, the buildings within the shaded area were sold to the Beauregard Development Co. (Inc.) The depot was not within the shaded area, but was not Government property. The sale by the Government did not include the land on which the camp site was located. However, the Beauregard Development Co. (Inc.) purchased this land from the owners at about the same time that it acquired the property from the Government.

10. In view of the fact that the various items of the claim, although all coming under the heading of "Additions and Betterments," involve separate matters, it becomes necessary to consider them seriatim.

ITEM NO. 1.—TRACK MATERIAL OTHER THAN TIES.

11. Following the conference of January 21, 1919, it was agreed that Mr. George W. Swilley, a Government engineer, and Mr. Joseph A. Lupo, assistant engineer of the Louisiana Railway & Navigation

Co., should each check the material in the tracks furnished by claimant. Mr. Swilley's report, dated February 28, 1919, shows a total of \$8,908.20, omitting ties. He states in his report that in order to check this material he received from Mr. Lupo "foremen's report on tracks laid in Camp Beauregard, which he (Mr. Lupo) claimed were complete, and contained the entire material claim of the Louisiana Railway & Navigation Co. against the Government." On March 13, 1919, Mr. Lupo made an inventory of the material actually furnished by claimant, showing a total of \$11,691.89. These figures were reached through an actual inventory. The records of claimant show that practically the same quantities of material were charged to this work as were inventoried by Mr. Lupo. Claimant has been paid \$8,889.20, leaving a balance of the original claim amounting to \$2,802.69. In order to protect the Government against any possible errors claimant reduced this item to \$1,401.34.

12. In view of the fact that Mr. Swilley's report is made from certain foremen's reports, some of which must have been omitted, whereas Mr. Lupo's report is made from an actual inventory of the property, it is thought that the Government is safe in accepting Mr. Lupo's report. The company has shown a spirit of fair play in deducting the sum of \$1,401.35. Furthermore, the articles charged on the claimant's books when the material was used in constructing these tracks show that material costing fully \$10,290.50 was furnished. The Board finds that this item of the claim, amounting to \$1,401.34, should be allowed.

ITEM NO. 2.—TIES.

13. This item, amounting to \$5,559.42, covers 8,530 ties furnished by claimant. Claimant has been paid for a portion of the ties furnished, but alleges that it has never received remuneration for the number carried in this item in the claim. An affidavit of E. F. Hunter, employed at Camp Beauregard by the United States Government as a field auditor, shows the number of ties furnished at Camp Beauregard by claimant and by the Lee Lumber Co., the only two companies delivering ties to this camp, the number of ties that have been paid for, the number of ties used in the various tracks, and shows that there is due claimant payment for 8,734 ties. Maj. A. M. Shaw testified in detail concerning the item of ties. His records show that the Louisiana Railway & Navigation Co. furnished 12,683 ties and was paid for 3,949, leaving payment due on 8,734 ties. Maj. Shaw stated that he gave these figures from an actual count of the ties made by himself at Camp Beauregard. (Transcript, pp. 152-163.)

14. Claimant's records show that there is due it payment for 8,530 ties. This is 204 less than revealed by the Government records. Claimant has not amended its claim to cover the balance of 204 ties, and it is possible that these 204 ties might have been furnished by the Lee Lumber Co. This item of the claim, amounting to \$5,559.42, should be paid.

ITEM NO. 3.—LABOR.

15. This item of the claim consists of labor used in connecting tracks, rearranging tracks and putting down new tracks on the Government reservation at Camp Beauregard, La., all coming under the head of "Additions and Betterments." Mr. J. J. Tippin, claimant's auditor, has submitted an affidavit in which he shows that the company expended the sum of \$6,310.40 for this labor. Mr. Tippin testified to the same effect at the hearing before this Board. Maj. Shaw in an affidavit estimated the cost of labor performed in constructing these additions and betterments, showing that under normal conditions the expense of this labor should not have exceeded \$5,935.90. However, he adds the following:

"In view of the known conditions of traffic and of camp operations it is my opinion that the claim of the Louisiana Railway & Navigation Company for \$6,310.40 represents an expense for labor actually and properly incurred by them in the construction and reconstruction of tracks for the Government and that the account is just and true and should be paid in full as claimed."

Maj. Shaw's testimony at the hearing confirmed this affidavit.

16. The amount of \$6,310.40 is an accurate record kept by the company, whereas Maj. Shaw's total of \$5,935.90 is an estimate only. In view of the fact that Maj. Shaw was not in a position to know the exact loss of time on account of interruptions to this labor due to the fact that the train service was in operation at the time this work was performed, and in view of the further fact that the entire amount represents an expense for labor actually and properly incurred, the Board finds that this item, amounting to \$6,310.40, should be paid in full.

ITEM NO. 4.—COST OF DIRT, ROCK, AND CINDER BALLAST, INCLUDING OPERATION OF STEAM SHOVEL.

17. This part of the claim is itemized as follows:

Expense of handling dirt ballast.....	\$916. 03
Amount paid for crushed rock and cinder ballast.....	1, 246. 10
Freight charges on crushed rock and cinder ballast.....	1, 023. 52

The dirt was loaded by steam shovel and hauled by claimant from a point off the Government reservation. The rock ballast was hauled from Winfield, La., while the cinders were transported from New Orleans, La. All of this material was placed upon the railways

constructed on the Government reservation at Camp Beauregard, La. Both the testimony of Mr. Tippin and Maj. Shaw show that this ballast is included under the heading of "Additions and Betterments." Maj. Shaw inspected this work and in a sworn statement says that he is convinced that this ballast was placed in the quantities as claimed.

18. The sworn testimony of Mr. Tippin shows that this ballast was furnished, while Maj. Shaw says that this ballast was "absolutely essential to the safe operation" of the train service, and that the quantities of ballast carried in this item of the claim are correct. This Board therefore finds that claimant should be reimbursed for the full amount of \$3,185.65.

ITEM NO. 5.—TELEPHONE LINE.

19. The telephone line involved in this item of the claim was constructed by claimant on verbal orders from Maj. Shaw, the matter being explained by Maj. Shaw at the hearing as follows:

"Why, as I recall it, the first move was somewhat in the nature of a censure from my office, directed against the trainmaster for taking chances in the operation of his trains. I had observed the rather reckless way in which they were handled. Everything was in a more or less confused condition; there was a big rush and I insisted that they take proper safeguards in the operation of the trains. That is my recollection of it now as being the first move that was made. There was no discussion of it; it was immediately taken up and the telephone service installed."

20. After the line had been constructed the company submitted a bill for \$961.04. Maj. Shaw inspected the line and estimated that the same should have cost \$631.95. The company thereupon reduced the claim to the amount suggested by Maj. Shaw. This covers only that part of the telephone line constructed on the Government reservation. The telephone line, including poles and wire, was sold by the Government to the Beauregard Development Co. (Inc.) in 1919.

21. The evidence clearly shows that the telephone line was constructed at the direction of Maj. A. M. Shaw, constructing quartermaster at Camp Beauregard; that this line was a part of the additions and betterments of the company; and that same was necessary in the operation of trains to and from the camp. The Board therefore finds that this item of the claim, amounting to \$631.95, should be paid.

22. When train service was first established at Camp Beauregard the railroad company had the use of a portion of a Government warehouse as its depot. When this warehouse was no longer available, the question of constructing a depot was taken up. On August 21,

1917, Maj. Shaw wrote the Officer in Charge of Cantonment Construction, Washington, D. C., as follows:

"1. Will you please advise if this office should take into consideration the construction of a passenger depot? It would appear as though the Camp would require a central passenger station of considerable size, and perhaps two additional stations of the 'suburban shelter' type.

* * * * *

"4. This building has been designed to utilize the standard construction of 20-foot buildings.

"5. Will you please advise if this office is to take any action looking to the construction of a passenger station?"

On September 7, 1917, Maj. Shaw wired the Officer in Charge of Cantonment construction as follows:

"Reference my letter August 21st regarding passenger and express facilities Camp Beauregard. Is such a building to be authorized?"

The following reply was sent to Maj. Shaw, the constructing quartermaster, by the Officer in Charge of Cantonment Construction:

"Reference your telegram of September seventh and letter of August twenty-first. Government has no right to expend funds for such purpose as mentioned in your letter. This office has no objection to the railroad company building its own station at its own expense. The site, however, should be selected after conference with Division Commander, railroad company, and yourself."

Thereupon, Maj. Shaw advised the American Express Co. by wire as follows:

"Just been advised by Washington that no depot building will be constructed at Government expense. Suggest you take matter up with the railroad company operating into camp."

Concerning instructions given by him to claimant relative to this matter, Maj. Shaw testified as follows:

"QUESTION: Major Shaw, you notified one of the express companies in writing that this depot would not be constructed at Government expense. Do you recall whether you notified the Louisiana Railroad & Navigation Company to the same effect?"

"MR. SHAW. I doubt very much if I notified them in writing, but I am certain that they were advised, either formally or informally to the same effect."

23. The depot was constructed at an expense of \$7,328.04. The American Express Co. paid claimant \$2,722.74, leaving an investment by claimant of \$4,605.30.

24. The depot was on the Government reservation when the Government sold its buildings to J. W. Alexander et al. The transfer stated that the Government did not sell any buildings on the camp site not owned by the Government. Mr. Alexander shows in the

following sworn statement the information given him by the construction quartermaster relative to this building:

"I was told by Major McConnell that the depot about which I have been questioned belonged to the Government and, according to my recollection, the depot was included in the list of buildings furnished by the construction quartermaster as buildings being sold by the Government."

The Beauregard Development Co. (Inc.) demolished the building in March, 1920, and sold the material.

25. Claimant advances two theories on which this item of the claim should be paid, either of which it is contended should be sufficient to justify payment. First, it is argued that this building was constructed in accordance with an informal agreement arising under the act of March 2, 1919. Secondly, claimant insists that, in view of the fact that the purchasers of Government buildings on the camp site demolished this building under the impression that same was Government property, the Government should remunerate claimant for the expense of erecting the depot.

26. The act of March 2, 1919, authorizes the Secretary of War to adjust, pay or discharge certain informal agreements that have been entered into "during the present emergency and prior to November twelfth, nineteen hundred and eighteen." In order therefore for this Board to assume jurisdiction of this item of the claim, the agreement under which same is filed must have been entered into before November 12, 1918. The evidence clearly shows that the Government gave no promise prior to November 12, 1918, that it would pay for the construction of this building. On the contrary, claimant was actually notified that the Government would not bear this expense. Thereafter the depot was erected and the cost prorated between claimant and the American Express Co.

27. Claimant has called attention to the conference of January 21, 1919, in which certain War Department officials recommend that claimant be paid for the depot in view of the fact that same is considered "Additions and Betterments." If claimant depends on an agreement made on January 21, 1919, it is readily seen that such an agreement comes too late to be considered under the act of March 2, 1919. This Board is without jurisdiction to adjust such an informal agreement.

28. Likewise, this Board has no authority to consider an informal agreement, implied or otherwise, arising on May 22, 1919, from an act of the Government. The buildings on the camp site were sold several months after the armistice, and it is neither necessary nor proper to discuss the effect of the transfer by the Government to J. W. Alexander et al.

29. In view of the fact that the Secretary of War has not jurisdiction to adjust this item of the claim, the Board disallows same

without discussing the merits involved. Claimant must seek its relief, if any, in the Treasury Department or a court of competent jurisdiction.

DISPOSITION.

This Board will make and transmit to the Transportation Section, War Department Claims Board, a statement of the nature, terms, and conditions of the agreement and certificate "C," covering items 1, 2, 3, 4, and 5 of this claim, for action in the manner provided in subdivision "C," section 5, Supply Circular No. 17, Purchase, Storage, and Traffic Division, General Staff, 1919.

Lieut. Col. McKeeby and Capt. Morgan concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

NOVEMBER 16, 1920.

Case No. 2606.

In re **CLAIM OF NEW YORK CENTRAL RAILROAD CO., WALKER D. HINES,
DIRECTOR GENERAL OF RAILROADS.**

1. **RAILROAD FACILITIES—GENERAL ORDER NO. 15 OF RAILROAD ADMINISTRATION.**—Where a railroad company at the request of the Government constructs a siding adjoining a chemical plant operated by the Government, the Government is obligated to reimburse the railroad company for the cost of the construction and removal of that portion of the siding on the railroad right of way from the clearance point to the outer boundary of the right of way in addition to that portion of the siding beyond the right of way.
2. **CLAIM AND DECISION.**—Claim for \$426.21 under the act of March 2, 1919, for the cost of the construction of a siding adjoining a Government chemical plant at Willoughby, Ohio. The facts are stated in an opinion denying relief reported in Volume 6, page 659. On appeal, the Secretary of War set aside the decision and remanded the case to the War Department Claims Board to determine the portion of the cost to be paid by the Government. Upon further investigation, it was found that claimant did not amortize any part of the cost of the track involved. Held, claimant is entitled to recover entire cost of siding on railroad right of way from clearance point to outer boundary of right of way.

Maj. Miller writing the opinion of the Board.

FINDINGS OF FACT AND DECISION.

- The Board finds the following to be the facts:
 1. This claim for \$426.21 was decided adversely to claimant by a decision of the War Department Board of Contract Adjustment reported in Volume 6, page 659, whereupon claimant appealed to the Secretary of War.
 2. On November 1, 1920, the Secretary of War remanded the claim to the War Department Claims Board with the following order:

“NOVEMBER 1, 1920.

“In the matter of the claim of New York Central Railroad, Board of Contract Adjustment, Case No. 150-C-2606. } On appeal before the Secretary of War.

“Upon consideration of the record in this matter, it is directed that the decision of the Board of Contract Adjustment be set aside and that further proceedings be had in accordance with the accompanying recommendation.

“(Signed)

NEWTON D. BAKER,
“Secretary of War.”

3. The recommendation of the special adviser is as follows:

"This is a claim for the cost of the construction of a railroad siding appurtenant to a chemical plant operated by the Government. The construction of the siding was requested by a representative of the United States, and a Treasury check was forwarded 'to serve as a guarantee for payment on this siding.' The cost of the portion of the side track which was laid outside of the railroad right of way has already been paid, and the present claim relates to the cost of that portion of the siding which was laid on the railroad right of way between the 'clearance point' and the outer boundary of the right of way. The decision of the Board denies claimant relief, and the Board bases its decision on the ground that prior to the construction referred to The Adjutant General had given notice that the Government would not pay for connecting links of rail between Government reservation and railway systems, and had notified the railroad that in accordance with prior custom, the railways would be compelled to bear the cost of such connecting links. The Board expresses the opinion that it was understood between the Government and the railroads that this rule applied to Government-owned factory sites requiring railroad facilities, as well as to Government reservations such as army camps and cantonments. Finding nothing in the record justifying the opinion expressed by the Board, I believe that upon the Government's request that the siding in question be constructed, an implied obligation arose to pay a just proportion of its cost, taking into account the usual custom of railroad companies and their patrons in connection with the installation of such facilities, as well as the respective benefits derived by the Government and the railroad from the track in question. The regulation of the Railroad Administration indicating that such a track should, as a rule, be paid for by the industry for which it is constructed, but that in exceptional cases the cost should be adjusted in accordance with the equities of the situation, tends to confirm this conclusion. I recommend that it be directed that the decision of the Board be set aside, and that the War Department Claims Board cause such further inquiry to be made as may be necessary to ascertain whether, in view of the profits incident to the business involved and all the surrounding circumstances, it is just that the cost of the track in question, or a portion thereof, be borne by the United States, and that claimant be allowed compensation for such portion, if any, of the cost of the track as may be found just.

"(Signed)

R. C. GOODALE,

"Special Adviser."

4. By direction of the Secretary of War, as set forth in the foregoing order, the decision of the War Department Board of Contract Adjustment dated June 30, 1920, denying relief is hereby vacated and set aside.

5. It is not necessary to repeat here the facts related in the former decision.

6. The Board has conducted further inquiry concerning the amount of business handled by claimant in connection with this siding. The track in question was constructed in October, 1918. Shortly there-

after the Government discontinued the operation of the chemical plant at Willoughby, Ohio. The plant was sold to a private industry, and the particular portion of the track involved in this claim was ordered removed since it was not required by the purchaser of the plant. The construction of this temporary portion of the track proved of no real benefit to claimant, the Government business which might have been handled over the siding having been first curtailed and later entirely eliminated on account of the armistice.

7. The Board finds that the Government is obligated to pay the entire cost of the construction and removal of that portion of the siding on the railroad right of way from the clearance point to the outer boundary of the right of way. The track was not used for a sufficient length of time to permit claimant to amortize any of the cost of this particular part of track, and the Government should therefore compensate claimant for this cost, which claimant fixes at \$426.21.

DISPOSITION.

The Appeal Section, War Department Claims Board, hereby transmits to the Transportation Section, War Department Claims Board, the decision of the War Department Board of Contract Adjustment dated June 30, 1920, hereby vacated by order of the Secretary of War; a statement of the nature, terms, and conditions of the agreement, and Certificate "C," both executed by direction of the Secretary of War for action in the manner provided in Subdivision C, Section 5, Supply Circular No. 17, Purchase, Storage, and Traffic Division, General Staff, 1919.

Lieut. Col. McKeeby and Capt. Morgan concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

NOVEMBER 18, 1920.

Case No. 3009.

***In re* CLAIM OF BALTIMORE TRUST COMPANY AND C. C. PUSEY, RECEIVERS OF THE HESS STEEL CORPORATION.**

- 1. EXPERIMENTAL WORK—CONTRACT.**—Where claimant is authorized by an officer of Ordnance Department to make experimental castings of nickel steel, for purpose of having chemical tests made, and in course of the work expenses are incurred which were incidental and necessary, and where, in order to conserve excess metal, it became necessary to pour such metal into smaller molds, and where the Government takes possession of such smaller castings, there is an implied agreement on the part of the Government to reimburse claimant such expenses, and to pay for the small castings at the fair market value thereof at the time they were taken.
- 2. CLAIM AND DECISION.**—Claim for \$2,327.54 transmitted from Ordnance Section, War Department Claims Board, for determination of whether an agreement with claimant existed, and if so, the nature, terms, and conditions thereof. Held, an agreement within the meaning of act of March 2, 1919, between claimant and Government, authorizing claimant to make experimental "heats" of nickel steel, and claimant is entitled to relief.

Maj. Blackburn writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim for \$2,327.54 arises under the act of March 2, 1919, and the several items which constitute it have been filed with the Ordnance Claims Board at various times and on various dates prior to June 30, 1919. However, statement of claim, Form B, under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, was not filed until the 7th day of April, 1920. The entire record has been forwarded to the Appeal Section, War Department Claims Board, by the Ordnance Section, War Department Claims Board, by a letter of transmittal dated September 18, 1920, which is here set out: Subject: Hess Steel Corp. OBC-3153, War Order P-7284-2260-A.

"1. In the consideration of the above claim by the Ordnance Section, War Department Claims Board, it develops that the tentative award submitted by the Philadelphia District Office is based on a verbal agreement rather than any records which may be found in the Ordnance files. The entire file, consisting of the supporting papers from Philadelphia, statutory award Form 1, Procurement

File on contract P-7284-2260A, and Procurement File on contract G-523-303C, are transmitted herewith for your information. It is requested that your Section determine whether an agreement existed with the Hess Steel Corporation; and if so, the nature and terms of said agreement."

2. It appears that on October 27, 1919, Maj. A. C. Henderson, of the Ordnance Department, prepared a "certificate of inspection and receipt" regarding this claim, in which he certifies that "the property purchased and the work done as represented by the various items so filed, were necessary for the public service, and that the prices were just and reasonable, and are in accordance with the agreement."

3. The matter was in the first instance submitted to the Philadelphia Ordnance District Claims Board, and after having been investigated by that organization, on August 10, 1920, a statutory award was tendered the claimant, in which it was stated:

"(2) The Secretary of War hereby awards to said claimant the sum of \$2,723.54 * * * which shall be in full adjustment, payment, and discharge of said agreement."

This award was accepted by claimant on August 25, 1920, and a voucher was made out in accordance with the findings of the Philadelphia Ordnance District Claims Board, but the award and voucher were not approved by the Ordnance Section of the War Department Claims Board.

4. The claim arises under the following circumstances: During the year of 1918 the claimant was engaged in the steel industry in Baltimore, Md. In the month of April of that year the Ordnance Department entered into negotiations with claimant for a certain number of "heats" of electric furnace steel. These negotiations were followed by a procurement order, War-Ord-P-7284-2260-A, dated May 4, 1918. This procurement order called for "24 tons, more or less (2,000 pounds each) of electric nickel-steel ingots," which said nickel steel was to conform with the Government analysis which was made a part of the procurement order. It was further provided in section 4 of the procurement order that the material ordered was to be made and delivered during the month of May, 1918. Thus, it will be seen that this procurement order was, in fact, a formal contract within the exceptions of section 3744, Revised Statutes. This procurement order was accepted by claimant. Thereafter, on May 29, 1918, procurement order War-Ord-P-7284-2260-A was amended to the extent of changing the shipping instructions for the material so ordered. This amendment was accepted by claimant. Thereafter, on August 24, 1918, a second amendment to the original procurement order was made, which was also accepted by claimant. The

second amendment is in the following words, letters, figures, and signs:

“WAR DEPARTMENT
PROCUREMENT DIVISION
SIXTH AND B STREETS, N. W.
OFFICE OF THE CHIEF OF ORDNANCE
WASHINGTON, D. C.

2nd Amendment to Procurement Order, War-Ord-P7284-2260A.

AUGUST 24, 1918.

SUMMARY.

Firm: Hess Steel Company,	Quantity, 13,145 pounds,
Address: Baltimore, Maryland.	more or less.
Order For: Electric Nickel Steel Ingots.	Price, \$7.05 per 100
	pounds.

Gentlemen:—

Referring to the order placed with you under date of May 4, 1918, for Twenty Four (24) tons, more or less (of 2,000 pounds each) of Electric Nickel Steel Ingots (Procurement Order, War-Ord-P7284-2260A) as amended under date of May 29, 1918, the United States of America acting through the undersigned under direction of the Chief of Ordnance, hereby informs you that in order to cancel a part of said order by reducing the quantity of said Ingots to Thirteen Thousand One Hundred Forty Five (13,145) pounds, more or less, the said Procurement Order, as amended, is hereby further amended by amending Paragraph one thereof to read as follows:

1. I am directed by the Acting Chief of Ordnance to, and do hereby give you an order for Thirteen Thousand One Hundred Forty Five (13,145) pounds, more or less, of Electric Nickel Steel Ingots.

2. Any communication in connection with this Amendment must refer to P7284-2260A; PR. If you accept this Amendment kindly wire this office to that effect and endorse and return the enclosed copy in the manner indicated thereon.

UNITED STATES OF AMERICA,
By R. P. LAMONT,
Col., Ord. Dept., U. S. A.”

GT:AB

The foregoing statement is embodied in these findings of fact for the purpose of having before us a history of the transaction from its inception. Neither the procurement order of May 4, 1918, nor the subsequent amendments thereto have any direct bearing upon the matters in the present issue.

5. Prior to the acceptance of the procurement order, and as a result of the negotiations then pending between claimant and the representatives of the Ordnance Department, it was deemed expedient that claimant should cast two experimental “heats,” to be poured in Buckeye molds. These “heats” were to be cast in two 20-inch ingots and were for the purpose of having certain tests made, in order to determine whether or not the steel was of the

same character and quality as was required by the Government. The two experimental "heats" were made and the 20-inch ingots were poured. In this operation it became necessary to dispose of whatever metal remained in the ladle after the pouring of the 20-inch ingots had been effected, and in order to save this metal sixteen 9-inch ingots were poured. One of the 20-inch ingots was, at the direction of the Ordnance Department, carted from the plant of the claimant to the Midvale Steel plant, and the other was taken by truck to the plant of the Bethlehem Steel Co. at Sparrows Point, Md., the purpose being to subject the ingots to the governmental tests. After the 20-inch ingots had been tested they were accepted by the Government, and have been paid for, and the payment for which is not in any wise a part of the instant claim.

6. The Government took possession of the sixteen 9-inch ingots, but no payment has been made for this metal. The claim here to be disposed of is, apart from the value of the 9-inch ingots, composed of expenses incurred in the production of the 20-inch ingots hereinbefore referred to, and in order that a better understanding of these several items may be had it is thought advisable to set them out in detail:

4/18	Express charges-----	\$273. 75
5/16	6 pcs. asbestos mill board, 30#, at \$0.15-----	4. 50
4/18	Hauling two iron castings weighing 4 tons each from Wells Fargo Express to Loneys Land, Lithicum's bill, 4/2-----	25. 00
5/3	2 sheets asbestos mill board, Keasby & Mattison's bill, 10#, at \$0.15-----	1. 50
5/1	1 plate per R. C. Hoffman's invoice 5/1, 91#, at \$0.03½-----	3. 19
5/8	Load steel, including toll to Philadelphia-----	82. 40
5/9	Hauling steel from Sparrows Point, 5½ tons, 10 hours, at \$3.50-----	35. 00
5/10	Load steel, including toll to Philadelphia, as per Maryland Trucking & Transfer Co.'s invoice-----	82. 40
5/31	Charcoal, 75#, at \$0.028-----	2. 10
	Soft whitewash brush-----	. 38
	75 Clay straights-----	5. 63
	75 Clay straights-----	5. 63
	Bag fire clay, used for 20-inch molds-----	. 23
4/25	Hours charged to U. S. Government a/c in error on April labor distribution, 11, at \$0.30-----	3. 30
5/21	Invoice Midvale Steel & Ordnance Co-----	160. 00
5/15	Invoice Buckeye Steel Castings Co-----	630. 50
	7 steel ingots, 9 inches square, 6,135 } at \$0.075-----	967. 97
	9 steel ingots, 9 inches square, 7,595 }	
8/31	Handling and heating 1 steel boom as directed-----	30. 00
10/13	Hot tops SP/352, at \$1.57 each-----	12. 56
	Drayage -----	1. 50
Total -----		2, 327. 54

The several items above set out were incident to the experimental work and were incurred by claimant in that connection.

7. Since the date of filing this claim the Baltimore Trust Co. has filed a petition in the circuit court of Baltimore city praying, among other things, that the Hess Steel Corporation be placed in the hands of a receiver. By an order of said court dated August 23, 1920, the

Baltimore Trust Co. and C. C. Pusey were appointed receivers of the Hess Steel Corporation with power and authority to take charge and possession of the goods, wares, and merchandise of said corporation, and to collect the outstanding debts due said corporation. The receivers for the Hess Steel Corporation have, by proper petition, together with a certified copy of the order of the circuit court of Baltimore City showing their appointment, filed before this Board, asked to be made parties claimant to this action now pending against the United States, which said petition has been made a part of the record herein. The Baltimore Trust Co. and C. C. Pusey were, on the 25th day of October, 1920, substituted as parties claimant in lieu of the original claimant, the Hess Steel Corporation.

8. It appears from the record that the Hess Steel Corporation was indebted to the War Credits Board in the sum of \$100,000. The record fails to disclose that satisfaction to the Government in this amount has at any time been made.

DECISION.

1. The authorization to the claimant by the Ordnance Department to cast the two experimental "heats" into the 20-inch molds in order that the character of the metal might be determined, was a separate and independent transaction from the order for 20-inch nickel-steel ingots as specified in the formal contract No. P-7284-2260-A, and created an implied agreement between the claimant and the United States, within the terms of the act approved March 2, 1919, whereby the United States is obligated to reimburse claimant the expenses and costs incurred in connection with the experimental work and for the sixteen 9-inch ingots so cast, at the fair market value thereof at the date when the ingots were taken by the Government.

2. We are of the opinion, and so hold, that the various items of the claim as set forth in the findings of fact constitute a valid and subsisting claim against the United States; that the same are legitimate and should be paid. The relief prayed for is granted.

DISPOSITION.

The War Department Claims Board, Appeal Section, will make and transmit a statement of the nature, terms, and conditions of the agreement, and Certificate C, to the Ordnance Section, War Department Claims Board, for action in the manner provided in subdivision (c), section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Lieut. Col. McKeeby and Mr. Marcum concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

NOVEMBER 18, 1920.

Case No. 2511.

In re **CLAIM OF CARLSON-WENSTROM CO.**

1. **CLASS "B" CLAIM ON APPEAL TO SECRETARY OF WAR.**—Where a contractor at the request of an officer of the Ordnance Production Department purchases additional machinery to expedite production on a contract which has been delayed by failure of the Ordnance Department to make deliveries of forgings on time, and is promised that the United States will reimburse it for such expenditures, such facts constitute an informal agreement within the purview of the act of March 2, 1919.
2. **FACTS AND DECISION.**—The decision of the Board of Contract Adjustment rendered in this case on May 8, 1920, denying relief is, on appeal to the Secretary of War, reversed and the relief asked for is ordered granted.

Capt. Taylor writing the opinion of the Board.

(ON RECONSIDERATION—BY ORDER OF THE SECRETARY OF WAR.)

FINDINGS OF FACT.

1. On May 8, 1920, the Board of Contract Adjustment rendered a decision in the above-styled claim, denying claimant any relief. On appeal to the Secretary of War, that decision was reversed by order dated October 29, 1920.

2. This claim is for reimbursement in the sum of \$21,342.64 for expenditures made by claimant for additional machinery purchased for the purpose of expediting production of 4.7" gun sights.

5. By the terms of formal contract C. F. 289, entered into between claimant and the United States, by J. A. Rice, lieutenant colonel, Ordnance Department, dated October 17, 1917, claimant was to make for and sell to the United States two hundred and eighty-six 4.7" gun sights, front and rear, complete, at \$250 each, the forgings to be furnished by the United States, and deliveries to "be made in accordance with instructions to be furnished by the Supply Division of the Ordnance Department, to begin on or before December 31, 1917, and the entire contract to be completed on or before May 31, 1918."

6. While the contract did not specify when the forgings, specifications, drawings, etc., were to be furnished to the contractor, nevertheless the specifications and drawings, and some of the forgings.

would have to have been delivered prior to December 31, 1917, in order to enable the contractor to begin deliveries by that time. The proof also shows conclusively that forgings were to be at claimant's plant on December 31, 1917.

No forgings were delivered until April, 1918, and an important drawing was not furnished until July, 1918.

Claimant's plant was sufficiently equipped to have enabled it to complete this contract on time if the forgings, specifications, and drawings had all been supplied in sufficient time. However, owing to the failure of the Ordnance Department to supply the contractor with the forgings, etc., so much time had elapsed, and there was such a great demand for the gun sights by our forces in France, that Lieut. S. S. Parsons, of the Philadelphia Ordnance Production Department, requested claimant to purchase and install additional machinery in order to expedite production, and stated that claimant would be taken care of on the purchase of the additional machinery. Similar requests and assurances were made by T. J. Brown, a civilian employee of the Philadelphia Ordnance Production Department, who was assistant to Lieut. Parsons; and also by Robert T. Harris, Chief Inspector of Ordnance in the Philadelphia District Ordnance Office.

7. Acting upon these requests and assurances of the above-mentioned officers of the Ordnance Department, claimant did, during the spring and summer of 1918, and prior to November 12, 1918, make expenditures for additional machinery to expedite the production of 4.7" gun sights on contract No. C. F. 289.

8. Production on the formal contract was suspended after the armistice at the request of the United States, and a settlement agreement thereon has been entered into between the contractor and the United States. The present claim, therefore, relates only to the additional machinery purchased to expedite production.

DECISION.

1. The Appeal Section finds: (1) That an informal agreement was entered into between claimant and the United States prior to November 12, 1918, by the terms of which the claimant was to purchase additional machinery to expedite production of 4.7-inch gun sights, and that claimant was to be reimbursed by the United States for such expenditures; (2) that upon the faith of this agreement, claimant did make expenditures and incur obligations prior to November 12, 1918; (3) that it is such an agreement as the Secretary of War is, by the act of March 2, 1919, authorized to adjust, pay, or discharge upon a fair and equitable basis.

2. The decision of the Board of Contract Adjustment rendered in this claim on May 8, 1920, and the formal order denying relief entered on the same day are hereby vacated.

DISPOSITION.

The Appeal Section will make and transmit a statement of the nature, terms, and conditions of the agreement, and certificate C, to the Ordnance Section, War Department Claims Board, for action in the manner provided in subdivision (c), section 5, Supply Circular No. 17, Purchase, Storage, and Traffic Division.

Lieut. Col. McKeeby and Lieut. Hendon concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

NOVEMBER 18, 1920.

Case No. 3019.

In re **CLAIM OF ALBERT MILLER & CO.**

1. **SALES—WHEN TITLE PASSES.**—Where claimant's contract provides for delivery of hay f. o. b. at a certain point and claimant delivers the hay there, the title to such hay thereupon passes to the Government, and the Government is liable to claimant for the contract price of the article so delivered.
2. **CLAIM AND DECISION.**—Claim for \$3,372.14 under act of March 2, 1919, for hay. Held, claimant entitled to recover.

Maj. Miller writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Claimant has filed a class "A" claim under the provisions of Supply Circular No. 17, Purchase, Storage, and Traffic Division, General Staff, dated March 26, 1919, for \$3,372.14, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The claim covers the alleged value of a shipment of hay made by claimant, commission merchants (receivers and shippers of hay, straw, and grain), of Chicago, Ill., in compliance with the following purchase order issued to claimant on May 24, 1917, by Col. A. D. Kniskern, Q. M. C., Depot Quartermaster, Chicago, Ill.:

"Albert Miller & Co.

"1,320,000 at 21.00 f. o. b. Melvin, Mich., and near-by points.

"3,980,000 at 24.00 or less f. o. b. Chgo. or near-by points.

"Baled 75 lbs. to 250 lbs.

"Good feeding hay.

"(Signed) A. D. KNISKERN,
"Col., Q. M. Corps, Depot Q. M.

"Chgo. 5/24/17."

3. In pursuance of this order a shipment, consisting of twelve (12) cars, promptly went forward as directed and reached destination in due course of transit early in June, 1917. The depot quartermaster, New York City, did not have sufficient storage facilities to care for this hay, and after a delay of fifty-four (54) days the hay was inspected and rejected, claimant refusing to receive same.

4. The record contains the findings of a board of officers, convened under the provisions of Circular Letter No. 60, Director of Purchase, dated August 29, 1919, which appears to be complete as to the details of the case, and the same is therefore quoted as follows:

"WAR DEPARTMENT,
"GENERAL SUPPLY DEPOT, UNITED STATES ARMY,
"ZONE SEVEN,
"1819 W. 39TH STREET, CHICAGO, ILLINOIS.

"OCTOBER 14, 1919.

"Change No. 1, Depot Order No. 618.

"Subject: Unpaid Bills of contractors.

"1. Depot Order No. 618 is hereby rescinded.

"2. In compliance with instructions contained in paragraph two, Circular Letter No. 60, from the Director of Purchase, dated August 29, 1919, the following board of officers is appointed:

"Lt. Colonel J. M. Churchill, Q. M. Corps,

"Lt. Colonel Wilbur Rogers, Q. M. Corps,

"Captain Charles R. Bell, Q. M. Corps,

"(In compliance with Change No. 2, D. O. No. 618.)

"3. All unpaid bills now in the hands of divisions for which evidence of delivery cannot be obtained, etc., will be presented to this board with all the evidence in question for their action.

"4. All previous instructions on unpaid bills now in the hands of the board appointed by Depot Order No. 618 will be turned over to the above board.

(Change No. 1 Depot Order No. 618, October 1, 1919.)

"By authority of the Zone Supply Officer:

"(Signed)

GEO. F. UNMACHT,

"Lt. Col., Quartermaster Corps,

"Zone Executive Officer.

"The Board met pursuant to the foregoing order at 9.00 A. M., July 12, 1920.

"Present—All the members.

"The Board then proceeded to consider the claim of Albert Miller & Co., Chicago, Illinois, for \$3,372.14, covering twelve (12) cars of hay delivered at New York on informal purchase order issued by A. D. Kniskern, Colonel Q. M. Corps, May 24, 1917, Colonel Kniskern being at that time Depot Quartermaster, Chicago, Illinois.

"The Board has carefully considered the claim of Albert Miller & Company, Chicago, Illinois (Exhibits "A" to "H," inclusive; "J" to "P," inclusive, and "R" and "S" attached) and finds that pursuant to informal purchase order issued by Colonel A. D. Kniskern, May 24, 1917, the Miller Company shipped twelve (12) cars of hay (listed Exhibit "H") to the Depot Quartermaster at New York City toward the end of May, 1917, which arrived at New York early in June, 1917. By the terms of the contract the hay was sold

F. O. B. and subject to inspection at destination. It appears that on June 4, 1917, the Depot Quartermaster at New York telegraphed the Depot Quartermaster at Chicago to hold up shipment of hay as the Depot Quartermaster at New York was without means to handle same; the hay, however, had already been shipped. The Depot Quartermaster at Chicago telegraphed the Depot Quartermaster at New York on June 4, 1917, to reject the twelve cars of hay on account of its being surplus.

"It appears that the Miller Company had no knowledge of the desire on the part of the Government to reject this hay until August 2, 1917. The exact location of the hay in the meantime can not be ascertained; it appears, however, that it was unloaded, placed on barges, and finally delivered at Pier # 2, Hoboken, N. J. Inspection was not made until July 28, 1917, though the hay arrived early in June, 1917. Inspection showed hay to be unfit for use. The Lehigh Railroad Company could not get the Miller Company or the Depot Quartermaster at New York to take this off their hands and was obliged to sell same for charges.

"The Board is of the following opinion:

"That the hay should have been inspected promptly on its arrival at New York; that then if the hay was found to be unfit for use it could easily have been rejected and turned back to the contractor; that the hay might have deteriorated through improper storage between the time of its arrival early in June, to July 28th, the time of its inspection; that if the Depot Quartermaster at Chicago had promptly taken the matter up with the contractor on June 4th, and notified him of the Government's desire not to accept this hay due to lack of means of handling same at New York, the contractor would have had an opportunity to dispose of the hay before the accumulation of demurrage and storage charges; that the Government was at fault in not notifying the contractor until August 2, 1917, of its desire to reject this hay.

"The Board therefore concludes that the claim of Albert Miller & Co., Chicago, Ill., for the 12 cars of hay (@ \$24.00 per ton, total value \$3,372.14) delivered at New York early in June, 1917, as a part of informal purchase order issued by Colonel A. D. Kniskern, May 24, 1917, is correct and just and that payment for this hay has not been made and recommends that claim for \$3,372.14 be paid.

"There being no further business brought before it, the Board adjourned at 10:00 AM to meet at the call of the President.

"GENERAL SUPPLY DEPOT, (Signed) J. M. CHURCHILL,
"CHICAGO, Major, Q. M. Corps, President.

"ILLINOIS.

"July 22, 1920. (Signed) WILBUR ROGERS,
"APPROVED AS RECOMMENDED. Captain, Q. M. Corps, Member.

"(Signed) EDMUND R. TOMPKINS,
"Lieut. Colonel, Q. M. Corps,
"Acting Depot Quartermaster.

(Signed) CHARLES R. BELL,
Captain, Q. M. Corps, Recorder."

5. The evidence before the Appeal Section confirms the facts as related in the findings of the officers who investigated this claim on July 12, 1920.

6. Mr. E. A. Dillinbeck, commission merchant of New York City, has furnished this Board an affidavit in which he gives information as to his connection with the transaction, the material parts of his statement being as follows:

"I was only acting as agent for Albert Miller & Co. in selling hay that was refused by the government. As he had instructed the government officials here in New York to deliver all hay to me, consigned to them, which was rejected by the government, this hay was detained a long time before the government notified me of its rejection, and as was my custom, I called upon the R. R. authorities, asking them for charges on the hay. When I discovered that they were very heavy I notified Miller & Co., and they instructed me not to handle the hay. And I so notified the R. R. Co. In order to relieve their barges, placed the 12 cars of hay upon their pier No. 66, foot 28th street. This hay arrived about August 18, 1918. I notified the Lehigh Valley R. R. Co. freight agent at their pier 66 again that I would not handle the hay, and was informed that the agent at that pier sold the 12 cars of hay to a dealer here in New York."

7. Claimant's invoices, all dated May 25, 1917, were made and addressed to "Depot Quartermaster, U. S. Army, 3615 Iron St., Chicago, Ill.," and show that they were rendered in accordance with the instructions contained in the memorandum purchase order forming the basis of the transaction (Finding No. 2) and that shipments of the hay had been made on Government bills of lading.

DECISION.

The terms and conditions of the agreement required claimant to make delivery of the hay f. o. b. the shipping points designated in the memorandum purchase order. Upon such delivery title to the hay vested in the Government, and therefore any question as to the inspection at destination is not to be taken into consideration. Claimant should be paid the contract price stipulated in the invoices which were rendered in due form. (Canadian Explosives (Ltd.), Case No. 2424, Vol. IV, Part 3, Decisions War Department Board of Contract Adjustment, p. 190; Carlisle Commission Co., Case No. 2428, Vol. VI, Part 2, Decisions War Department Board of Contract Adjustment, p. 41.)

DISPOSITION.

The Appeal Section, War Department Claims Board, will make and transmit to the Purchase Section, War Department Claims

Board, a statement of the nature, terms, and conditions of the agreement and certificate form "C" for action in the manner provided in subdivision "C," section 5, Supply Circular No. 17, Purchase, Storage, and Traffic Division, General Staff, War Department, 1919.

Lieut. Col. McKeeby and Capt. Morgan concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

NOVEMBER 18, 1920.

Case No. 2490.

In re **CLAIM OF THE WESTERN INDUSTRIES CO.**

- 1. FACTS AND DECISION.**—On June 18, 1920, the Board of Contract Adjustment rendered a decision in this case denying relief on a formal contract on the ground that the contractor was in default on deliveries. On appeal the Secretary of War ordered the decision set aside and relief granted. For first decision see Volume VI, page 380.

Capt. Taylor writing the opinion of the Board.

ON RECONSIDERATION BY ORDER FROM THE SECRETARY OF WAR.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. On June 18, 1920, the Board of Contract Adjustment rendered a decision in the above-entitled claim denying claimant any relief. On appeal to the Secretary of War that decision was reversed by order dated November 9, 1920, and the claim is now before the Appeal Section for a decision to be entered in accordance with the order of the Secretary of War.

2. By the terms of formal contract No. 1309 (Medical Corps), dated September 13, 1918, entered into between claimant and the United States, by Frank L. McCartney, captain, Sanitary Corps, U. S. A., the contractor was to furnish and deliver to the United States 200,000 gallons of ethyl alcohol, 190 degrees proof, at 49.5 cents per gallon, f. o. b. Agnew, Calif. By the terms of the contract delivery was to begin on the date of the approval of the contract (Oct. 14, 1918), one-half to be made within 30 days, and complete delivery to be made within 60 days.

3. Claimant manufactured 30,000 gallons of alcohol to be applied on this contract, but no deliveries thereon were ever made. Correspondence which passed between claimant and the Medical and Hospital Supply Division, Office of the Director of Purchase and Storage, shows that claimant was not in default on deliveries. Production and delivery of alcohol on this contract was suspended by the contractor at the request of the United States after the signing of the armistice.

4. The claim is only for the loss sustained by the contractor on the 30,000 gallons of alcohol which had been manufactured for delivery on the contract at the time it was suspended, and is for the difference between the contract price thereof and the price at which the contractor was able to dispose of it on the declining market. No claim is made for any loss sustained on material on hand applicable to the remainder of the contract.

DECISION.

1. At the request of the United States the claimant withheld delivery of 30,000 gallons of alcohol on contract No. 1309 (Medical Corps), dated September 13, 1918, and disposed of it on a declining market, thereby sustaining a loss. A settlement contract should be entered into, fair and just to the claimant, and at the same time to the benefit of the United States.

2. The decision of the Board of Contract Adjustment rendered in this claim, on June 18, 1920, is, by order of the Secretary of War, hereby vacated.

DISPOSITION.

A copy of this decision will be transmitted to the Purchase Section, War Department Claims Board, for appropriate action.

Lieut. Col. McKeeby and Lieut. Hendon concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

NOVEMBER 19, 1920.

Case No. 3022.

In re **CLAIM OF BAKER & LOCKWOOD MANUFACTURING CO.**

TERMINATION CONTRACT.—Where claimant entered into a termination contract with the Government on account of any claim or commitment under the said contract, the same is final and can not be reopened by this Board or re-formed except in the case of fraud or gross mistake, and the same is binding upon the claimant and it is precluded from setting up any further commitments under the said contract.

FACILITIES AND MATERIALS.—Where claimant has a contract for the coloring and waterproofing of airplane hangars, which is suspended before claimant begins work in dyeing or waterproofing the said hangars, and said claimant is unable to point out to the Government any expenditures made under the same, it is thereby precluded from recovering on account of the said suspension or termination of the contract.

DEMURRAGE.—Where claimant has a contract to dye and waterproof certain airplane hangars at the rate of 30 per day, but only treats 9 to 10 per day, and cars shipped by the Government to claimant containing hangars accumulate on the sidetrack, and claimant is thereby compelled to pay demurrage on same, the said demurrage can not be recovered from the Government as the accumulation of cars was caused by claimant's failure to comply with the terms of its contract.

Maj. Farr writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim in the sum of \$22,439.55 was originally filed as a Class A claim with the Air Service Section, War Department Claims Board, which disallowed the claim in its entirety, from which decision the claimant appealed to this Board.

2. On September 9, 1918, the claimant received an order, No. 820024, followed by contract 4663, dated September 14, 1918, for coloring 400 airplane hangars at \$60 each. This order was later amended to cover 150 hangars at \$60 each and 250 at \$64.40 each, or a total of \$25,150. Under this order 150 hangars were colored or treated at Detroit, Mich., at \$60 each, a total of \$9,000, and the balance of 250 hangars were shipped by the Government to the claimant at New Orleans. Seventy-five of this last-named lot of hangars were colored at \$64.60 each, or a total of \$4,845, making a total of 225 hangars completed, shipped, and paid for by the Gov-

ernment, \$9,000 being paid claimant on December 30, 1918, and \$4,845 on January 13, 1919, or a total amount of \$13,845.

3. On the 19th day of December, 1918, at which time this contract had been 56 per cent completed, claimant received telegram terminating or suspending the contract, and thereafter a termination or settlement contract was entered into under which the claimant was paid \$11,305 in settlement, which amount, in addition to the \$13,845 previously paid for the completed work, made a total payment to claimant of \$25,150, the contract price as set forth in the original contract as amended.

4. The settlement contract entered into by claimant was dated the 17th day of April, 1919, and provided for payment to the claimant of \$10,983.25, the difference of \$321.75 between that amount and the sum of \$11,305 previously referred to being caused by the claimant purchasing from the Government 495 gallons liquid waterproofing dope at 65 cents a gallon. The papers attached to the said settlement contract show that the item of \$11,305 was made up of cost of raw materials on hand, including handling charges and overhead, portion of five cars waterproofing dope, three cars at Kansas City, Mo., and two cars at Port Huron, Mich.

5. Article III of the said settlement contract contains a formal release in the following language:

"The Contractor does hereby for itself, its successors and assigns, remise, release, and forever discharge the Government of and from all and all manner of debts, dues, sum or sums of money, accounts reckonings, claims, and demands whatsoever due or to become due in law or in equity under or by reason of or arising out of said Order."

Article IV describes the material that was to become the property of the Government and that which the claimant was to retain title to, as follows:

"All of the material scheduled in said report shall remain the property of the Contractor except *132 barrels* (6864 gallons) of waterproofing dope in original containers in the Warehouse of Contractor at Kansas City, Mo., and 5,900 gallons Duplex Preserves on the premises of the Robeson Preserve Company at Port Huron, Michigan, which shall, upon the payment of the amount mentioned in Article II hereof, become the property of the Government."

6. On October 28, 1918, claimant received Order No. 420026, which was followed by Contract No. 5212, dated November 1, 1919, providing for the dyeing and waterproofing by claimant of 1,182 canvas tent hangars at \$79.60, or a total compensation of \$94,087.20, the papers attached to the said contract stating that the award was made at an upset price subject to investigation by the Contract Department.

This contract was also suspended on December 19, 1918, by the following telegram, which applies to both contracts:

“Render no further services in connection with Order No. eight two naught naught two four and four two naught naught two six stop. Incur no further expense under these orders stop. Acknowledge receipt.”

7. The foregoing telegram was confirmed by letter dated December 21, 1918, upon receipt of which it seems that the claimant ceased all operations.

8. On or about the 21st day of October, the Government desiring that the tents should be treated and colored at New Orleans, claimant moved its equipment used in coloring the tents from Detroit to New Orleans, to which place the Government proceeded to ship hangars to the claimant, this change apparently being made in order to facilitate shipment to Europe, as the said tents were then to be shipped from the port of New Orleans, thus saving double handling of the said hangars.

9. On the 30th day of October, 1918, the War Department detailed Lieut. Russel P. Hoyt as property officer, who, proceeding to New Orleans, arrived there on the 4th day of November, 1918, and found claimant located on Carrolton Avenue, where it was occupying a vacant lot, on which it afterwards proceeded to color and treat the tents. About the 9th of November the tents began to arrive, and certain cars were then unloaded, and thereafter, between that date and the date of the suspension of the order, cars loaded with tents arrived faster than claimant was enabled to take care of them, which resulted in the railroad submitting to claimant a bill in the sum of \$417.15 for demurrage, which was finally paid by the claimant. The evidence establishes that each car held approximately 25 hangars, and the claimant's contract provided that it should complete 30 per day.

10. Claimant's contention is that prior to its removal to New Orleans it advised the Government of the insufficient siding and storage facilities and requested that cars be shipped only as it could handle them. It appears that some correspondence was exchanged between claimant and the Government, but that the Government was compelled to ship the cars, and could not comply with claimant's request to ship only one car of tents per day, but was compelled to ship the tents as they could be loaded from warehouses, and that by reason of such shipment by the Government tents arrived faster than claimant was able to handle them, and as their switch would only hold a few cars the railroad demanded the payment of demurrage, and that claimant tried to get the Government to pay said demurrage, as the tents were consigned to the Government and not to the claimant.

11. The evidence establishes the fact that the tents were shipped to the claimant. In fact, claimant by telegram dated the 4th day of October, 1918, among other things, requested—

“Ship tents to Baker & Lockwood, New Orleans, and bill lading to me, Hotel Monte Leon.”

Lieut. Hoyt took the matter up with the Government, which instructed him that claimant should pay the demurrage, as their failure to treat the number of tents per day as specified in their contract resulted in the accumulation of the demurrage, as the cars could not be unloaded.

12. Numerous attempted settlements have been negotiated with the claimant. The claimant had a full hearing before the Claims Board of the Aircraft Production, at which time their Mr. Wilson appeared and testified, and his evidence was reduced to writing and has been considered by this Board in arriving at its decision. Claimant's further contention is that it moved its plant to New Orleans at the special request of Mr. Shea, in the Aircraft Production Office, Washington, D. C., and that in the settlement under the first contract, No. 4663, no allowance was made the said claimant on account of the cost incident to the said moving, nor has claimant been paid for the kettles and various equipment turned over to the Government, which were used by the said claimant in the treating of the tents for which it was paid, and that if claimant had been allowed to complete the second order, No. 420026, for the waterproofing of 1,182 canvas hangars, at \$79.60 apiece, all of its expenses incident to the removal of its plant from Detroit to New Orleans would have been recouped, and that by reason of the said cancellation the said claimant has suffered a loss and that the same should either be paid under the first contract or that claimant be paid the said expenses under the second contract.

13. The further contention of the claimant is that as the first contract, No. 4663, and the preparations for the performance of the second contract, No. 5212, were carried on simultaneously it is an impossibility for it to separate the various items of expense and expenditure incurred or to allocate the same to the contract under which the same occurred. It contents itself with the statement that as it made these expenditures and suffered certain losses in performing a certain portion of the first contract and in preparing to perform the second contract, including its moving charges to New Orleans, that this Board should make an allowance sufficient to cover the said expenses, commitments, or losses.

14. In one of the various statements submitted by the claimant under the second contract it alleged it was due the sum of \$1,125.26, covering 10,314 pounds of green pigment paint, and a certain item of \$10,251.66, covering indirect material, labor, and overhead. Audit

was thereupon made of claimant's books, and instead of showing \$11,376.92 that could in any wise be allocated to contract No. 5212, the auditor found only the sum of \$6,944.17, made up of two items: First, raw material, being the said 10,314 pounds of green pigment; and, second, overhead expenses of \$5,818.91.

15. Upon receipt of this information in Washington a supplemental contract was made up in the sum of \$6,944.17 and forwarded the contractor for signature, which it refused to sign on the grounds that the reduction of their claim from \$11,376.92 to \$6,944.17 was erroneous. Thereupon additional investigation by the Contract Section and the various auditors led the Government to the conclusion that neither the original claim of \$11,376.92 nor the revised claim of \$6,944.17 were correct, but that the correct amount that should be allocated to the second contract was the sum of \$1,125.26 (10,314 pounds of green pigment lead), and demurrage of \$417.15 and such other expense as has been incurred under Order No. 420026, Contract No. 5212.

16. Claimant in May, 1920, through its Mr. Wilson, withdrew its claim of \$1,125.26 for 10,314 pounds of green pigment, as it had made arrangements with the makers of same to take it over without expense to claimant. This leaves the only items before this Board for settlement—that of demurrage in the sum of \$417.15 and any other expenses incurred in getting ready to perform the second contract, No. 5212. It is admitted that no hangars were treated under the second contract.

DECISION.

1. Claimant under its first contract, No. 4663, has been paid an amount equal to the total amount it would have received if it had performed the whole contract, though it was only 56 per cent completed, and, in turn, has signed a release (hereinbefore quoted) waiving any and all further payments on account of the said contract. This is final, and in the absence of fraud or gross error this Board can not reopen it. Claimant has specifically refused to allege any fraud and has failed to produce any evidence that would justify this Board in reopening this settlement or to allow any reformation of the same. In fact, it is a well-established principle of the War Department that in no settlement upon the cancellation or termination of a contract can there be paid to the contractor any sum greater than the total contract price named in the said agreement. Even if the said settlement contract was not final and conclusive on claimant, it would be precluded in any settlement from recovery under the first contract any sum greater than the total amount named therein as the contract price for the performance of all work required thereunder.

2. Under the second contract claimant has failed to produce any evidence showing any expenditures or commitments. The item of demurrage of \$417.15 is an item that is directly chargeable to the claimant's failure to spray or waterproof the said tents at New Orleans at the rate provided for in the contract. If claimant had treated 30 tents per day after the tents began to arrive at New Orleans there would have been no demurrage. Lieut. Hoyt has testified that after the receipt of the telegram suspending the contract that all cars arriving thereafter were taken over by the Quartermaster Department and reshipped, and that no demurrage was paid by claimant on account of the same. Lieut. Hoyt further testified that the field and equipment used at New Orleans by the claimant was inadequate and insufficient to handle the number of tents the contract provided claimant should treat per day and that the said field was not only too small but was low and damp and part of it covered with water.

3. The claimant has been afforded every opportunity to properly prove its claim, the Government files being voluminous, indicating that every consideration has been accorded claimant and that it has been given every opportunity to prove its expenditures, but has failed to do so. It is not believed by this Board that the claimant's allegation that, as the contracts were being performed at the same time, it is thereby excused from presenting to this Board a proper detailed and separate statement of the expenditures made under each contract.

4. For the foregoing reasons all relief asked for in this case is denied.

DISPOSITION.

A final order denying relief, will issue.

Lieut. Col. McKeeby and Capt. Sheppard concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

NOVEMBER 23, 1920.

Case No. 2875 (formerly 261).

In re **CLAIM OF CURTIS LUMBER & MILLWORK CO.**

1. **CLAIM AND DECISION.**—Under date of February 26, 1920, after a hearing the Board of Contract Adjustment issued a document setting forth the nature, terms, and conditions of an agreement between the claimant and the Government, whereby the claimant agreed to supply certain frames and trim for sash and doors for 10 two-squadron aviation camps. The claim is again before this section on appeal from the action of the Air Service Claims Board in deducting from its award certain amounts which it found had been overpaid claimant in connection with the two other orders. The decision in this particular case deals only with the amounts due claimant according to agreement found by the Board at the previous hearing; no principles of law are discussed therein. (For full statement of facts and discussion of the principles of law see the former opinion in the Decisions of the Board of Contract Adjustment, Vol. VII, p. 712.

Maj. Hill writing the opinion of the Board.

CORRECTED DECISION.

This case is before this section on appeal from the action of the Air Service Claims Board in deducting from its award on a class B claim certain amounts which it found had been overpaid claimant in connection with the two other orders.

Claimant has requested reconsideration of the decision of this section dated September 29, 1920. The Rehearings Committee of this section granted reconsideration to the extent of correcting the amount which claimant had been paid per unit on order No. 750098 from \$375.83, the amount stated by the Air Service Section, to \$375, which it appears was the sum actually paid, and the consequent correction of the amount therein overpaid from \$395.25 to \$333.

FINDINGS OF FACT.

1. Under date of February 26, 1920, the Board of Contract Adjustment issued a document setting forth the nature, terms, and conditions of an agreement between claimant and the Government whereby claimant agreed to supply certain frames and trim for sash and doors for 10 two-squadron aviation camps.

2. Claimant alleges that it delivered a certain portion of the material and that it suffered a net loss of \$1,065.75 upon the balance of the material not delivered to the Government. The claim was approved in this amount by the Air Service Claims Board. The Liquidation Division of the Air Service, however, found that overpayment had been made to claimant company by the Air Service in making settlement under order No. 370050 to the extent of \$252.04 and under order No. 750098 to the extent of \$395.25.

3. Under Order No. 370050 the Liquidation Division contended that claimant had been overpaid in the sum of \$3,933.56. In deducting this amount in the payment of Order No. 750098, the amount there deducted was \$3,681.52, and that difference, namely, \$252.04, was due the Government. Under date of August 4, 1920, in response to a request for specific information as to whether the amount of the overpayment actually was \$3,933.56, or \$3,681.52, this section was advised by the Chief, Liquidation Division of the Air Service, that the overpayment on Order No. 370050 was \$3,681.52.

4. Order No. 750098 was issued for "75 fixed gun-training models, same as those now being manufactured on Order No. 370050, at \$500 each, \$37,500. Note.—These are upset prices only and subject to revision on the basis of 10 per cent profit after investigation of cost. The Bureau of Aircraft Production reserves the right to send accountants to your factory to investigate costs." This order was followed by a formal contract, No. 4994, dated October 18, 1918, by which the contractor agreed to furnish the material described in Order No. 750098. Claimant alleges in its letter of November 7, 1918, to Mr. W. J. Barry, Chicago representative of the Liquidation Branch of the Air Service, that after the contract was received its Mr. E. J. Curtis took up with Capt. Schnacke, A. S. A. P., the contracting officer, the latter part of October, in Washington, the matter of the upset prices and was informed by Capt. Schnacke that this clause was a formality and that the understanding between them was that the price of the Models was to be \$500 each.

5. In an affidavit dated August 20, 1920, furnished to this section Capt. Schnacke makes the following statement:

"2. This order for fixed gun-training models was placed with the Curtis Lumber & Millwork Co. at a maximum price of \$500 per unit, which maximum price was subject to revision by the Bureau of Aircraft Production on the basis of cost plus ten per cent (10%) after a cost investigation had been made. It is my recollection that the Contractor made some objection to this reservation but later agreed to it when it was explained that such procedure was being followed by the Bureau of Aircraft Production with many other Contractors who were manufacturing articles on which the Government had no cost data."

6. Mr. W. J. Barry, of the Liquidation Division of the Air Service, in his affidavit dated July 23, 1920, to this section, states as follows:

"9. On October 16, 1919, the writer received instructions from Washington to go to the plant of the Curtis Lumber & Millwork Company to make an audit and investigate to determine the cost on Order No. 750098, and in compliance with these instructions he called at the plant but was not allowed to proceed with the investigation there. Their Mr. L. S. Whitely, Vice President, requested that no investigation be made, as they refused to recognize the upset price in the contract, stating that this clause had been verbally waived by Captain Schnacke the latter part of October, 1918, as being a mere formality, and claimant insisted that the full amount of \$500.00 each model be paid them."

7. As it was impossible to determine the cost of production on Order No. 750098, the Air Service took the figure which it had determined as the cost of the first order—namely, \$336.87—and adding 10 per cent as profit found the unit cost under this order to be \$370.56. As the models delivered under this order had been paid for at the rate of \$375 each, claimant had been overpaid \$4.44 on each of the 75 models delivered, or the sum of \$333.

DECISION.

1. It appears as to Order No. 370050 that the difference of opinion as to whether the overpayment was \$3,933.56 or \$3,681.52 has been reconciled, and that the sum of \$3,681.52, the amount actually deducted, was the proper amount to be deducted. It follows that there is no other sum due the Government on account of this order and that the proposed deduction of \$252.04 from the award in the instant case was improper and should not be made.

2. Order No. 750098, which became merged in the formal contract No. 4994, provides specifically that the price of \$500 was the upset price only and was subject to revision on the basis of 10 per cent profit after investigation of cost. It is our opinion that this provision was never waived by Capt. Schnacke and that the terms of the original contract are binding upon claimant.

3. In view of the fact that claimant had received a partial payment on account of this order at the rate of \$375 per model and had refused to permit an audit of its books, there was no alternative other than to estimate the actual cost of production. The action of the Liquidation Division of the Air Service in taking as the true cost under this order the cost which had been heretofore found by an audit of the previous order No. 370050 does not appear to be prejudicial to the interests of the Government. The claimant, in

any event, can offer no objection in view of its refusal to permit the Government to determine the actual cost by an audit. This cost was \$336.87, and adding 10 per cent as profit makes the unit rate \$370.56. On that basis claimant was overpaid \$4.44 on each of the 75 models, and there is due the Government \$333, which should be deducted from the award of \$1,065.75 in the instant case.

DISPOSITION.

The Appeal Section transmits its decision to the Air Service Section for action in accordance with the decision.

Lieut. Col. McKeeby and Lieut. Tabb concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

NOVEMBER 23, 1920.

Case No. 2659.

In re **CLAIM OF A. R. MOSLER CO.**

1. CLAIM AND DECISION.—Facts are stated in decision of the Board of Contract Adjustment dated June 30, 1920, reported in Volume VI, page 1036. On appeal the Secretary of War affirmed the decision with the exception of Item No. 5, and returned the record to the Appeal Section with directions to disallow credit claimed by the United States by reason of subleasing of claimant's building. The Appeal Section modified the opinion of the Board of Contract Adjustment in accordance with the directions of the Secretary of War.

Lieut. Col. Smith writing the opinion of the Board.

ON RECONSIDERATION.

1. This case was decided adversely to claimant by the Board of Contract Adjustment June 30, 1920.

2. From that decision claimant noted an appeal to the Secretary of War. The Secretary of War, upon consideration of the record under date of November 12, 1920, returned the record to the War Claims Board with the following order:

“Upon consideration of the appeal and record in this case, the decision of the Board of Contract Adjustment is affirmed with the exception of Item #5. In my opinion the United States is not entitled to a credit for any sums claimant may make by reason of subleasing of the building in question. The case is therefore returned for further action by the Appeal Section on Item #5.”

3. By direction of the Secretary of War, as set forth in the foregoing order, the Appeal Section, War Department Claims Board, has reconsidered the action of the Board of Contract Adjustment with reference to Item No. 5 of the claim. Upon reconsideration by the Appeal Section the opinion of the Board of Contract Adjustment, dated June 30, 1920, is modified as to Item No. 5 in accordance with the views expressed in the order of the Secretary of War. As so modified the opinion of the Board of Contract Adjustment is affirmed.

DISPOSITION.

The Appeal Section, War Department Claims Board, hereby transmits this decision, together with the decision of the Board of Contract Adjustment, to the Air Service Section for appropriate action.

Lieut. Col. McKeeby and Capt. Frazer concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

NOVEMBER 29, 1920.

Case No. 3008.

In re **CLAIM OF THE BARTLETT-HAYWARD CO.**

MATERIALS.—Where the United States Government issues claimant a procurement order stating the United States will furnish the steel body forgings, steel head forgings, steel diaphragm forgings, copper bands, explosives as required, and packing material necessary for the performance of the order f. o. b. cars at claimant's plant, there is an implied agreement that, if the Government fails to so furnish the said material and it becomes necessary in the making of the shrapnel called for under the said procurement order for claimant to furnish the said materials, the United States Government will pay the claimant the reasonable value of the material so furnished by said claimant.

Maj. Farr writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is a Class B claim for the sum of \$34,620.52 on account of commitments alleged to have been made by claimant under a procurement order and is filed directly with this Board. The claimant, under date of June 26, 1919, directed a letter to the Secretary of War in which it filed a blanket claim on account of all contracts, or agreements, theretofore entered into between the claimant and the United States Government, furnishing as Schedule A a list of the contracts so entered into between it and the Government, among which contracts Procurement Order No. P17277-4203A is listed and set out. Claimant took no further action under this blanket filing until the 16th day of September, 1920, when the claim here presented was filed and later amended under date of October 11, 1920.

2. During the early part of 1918, the claimant, a corporation engaged in business at or near Baltimore, Md., was making various shrapnel for the United States and, on the 29th day of October, 1918, received Procurement Order No. P17277-4203A for ten thousand 4.7-inch shrapnel as follows:

PROCUREMENT ORDER.

War-Ord. P17277-4203A.

Date: October 29, 1918.

Quantity: 10,000.

Price: \$9.307 each.

Total: \$93,070.00.

SUMMARY.

Firm: Bartlett-Hayward Company.

Address: Baltimore, Maryland.

Order for: 4.7" Shrapnel, base charged, less fuze.

GENTLEMEN:

1. The United States of America, acting through the undersigned, under direction of the Chief of Ordnance, hereby gives you an order for Ten thousand (10,000) 4.7" Shrapnel, base charged, less fuze. This order is subject to the terms and conditions stated below and to the "Additional Terms and Conditions" annexed hereto and made a part hereof.

2. The forging of the Shrapnel ordered herein shall be in accordance with Ordnance Office Drawing 75-20-9, revised January 16, 1918, and the machining of the Shrapnel shall be in accordance with Ordnance Office Drawings 75-2-146, revised June 24, 1918, and 75-2-147, revised June 24, 1918, a brown print of each of which said drawings has already been furnished you. This Shrapnel shall also be in accordance with Ordnance Office specifications for Shrapnel Ga 105-1, approved October 11, 1917, a copy of which has already been furnished you.

3. The United States will furnish the steel body forgings, steel head forgings, steel diaphragm forgings, copper heads, explosives as required, and packing material necessary for the performance of this order f. o. b. cars, your plant, Baltimore, Maryland, in such quantities and at such times as may be deemed requisite by the Chief of Ordnance. You shall pay any demurrage, storage, switching, or cartage charges accruing after delivery.

4. The Shrapnel ordered herein will be inspected by the Inspection Division, Ordnance Office.

5. Delivery of the Shrapnel ordered herein shall be made at once. This letter, with your acceptance endorsed on the enclosed copy, will constitute the contract. A formal contract will not be required.

6. (a) You will be paid for the Shrapnel ordered herein, upon their acceptance by the United States, f. o. b. your plant, Baltimore, Maryland, at the rate on Nine dollars and thirty and seven-tenths cents (\$9.307) each, or a total of Ninety-three thousand and seventy dollars (\$93,070.00). Payment will be made through the District Ordnance Office, Washington, D. C.

(b) You shall furnish all material not furnished by the United States necessary for the completion of this order.

(c) If during the process of manufacture the steel forgings, copper bands, and other component parts furnished by the United States as herein provided develop defects without your fault the United States will pay you the cost incurred in machining the forgings and copper

bands and all work done on other component parts, up to the time said defects were discovered. Such additional cost as determined and allowed every thirty days during the currency of this order will be paid by the United States to you. The scrap resulting from the defective material referred to in this paragraph shall remain the property of the United States.

(d) Every thirty days during the currency of this order, the cost to the United States of the steel forgings, copper bands, and other component parts lost, spoiled, or destroyed through negligence or faulty workmanship on your part will be computed by the Chief of Ordnance. The total cost thereof will be charged against you and deducted from any payments to be made to you, or if no such payments remain to be made you shall immediately pay to the United States the cost of such steel forgings, copper bands, and other component parts. Upon repayment to the United States by you of the cost of the forgings, copper bands, and other component parts herein referred to, the scrap resulting from the spoilage or destruction of such materials shall become your property.

(e) All scrap resulting from the proper performance of this order shall become your property except as herein otherwise provided.

(f) At your own expense, with the packing material which is being furnished by the United States, as herein set forth, you shall suitably pack, box, or make such other shipping provisions as will insure the arrival of the Shrapnel herein ordered at their destination in as good condition as when accepted by the United States at your plant.

7. The Shrapnel ordered herein should be charged to the Chief of Ordnance, United States Army.

8. Shipping instructions will be furnished you later by the Ordnance Office.

9. Communications on this subject should refer to P17277-4203A; PP. Your acceptance of this order should be acknowledged by wire and confirmed by signing, dating, and returning the enclosed copy as indicated thereon.

United States of America,

By (Sgd.)

W. H. GELSHENEN."

3. At the time that this procurement order was issued, claimant was then engaged in the performance of Contract G-1397-764A calling for 200,000 complete rounds of 4.7-inch shrapnel and the contention of claimant is that it was requested to divert from the said contract 10,000 4.7-inch shrapnel, and that thereupon the said 10,000 shrapnel were diverted, the procurement order hereinbefore quoted being issued to take care of the said 10,000 so diverted and that, in the performance of Contract G1397-764A, certain materials purchased for the performance of that contract and in excess of it, were diverted to the performance of procurement order P17277-4203A, but that the total amount of materials that were furnished by the Government, notwithstanding the allocation to the performance of the said procurement order of certain materials from Contract G1397-764A, was less than it agreed to provide under the said pro-

curement order, and for that reason this claim is presented. It appears that the 10,000 rounds of shrapnel ordered under the said procurement order have been delivered by claimant and accepted by the Government, and that claimant has been paid for the same, this claim being for the materials only that the claimant alleges the Government failed to provide it in accordance with the terms of the said procurement order.

DECISION.

1. The only reason that this claim is presented to this Board is because the procurement order being an informal one, an expression is desired as to whether or not the said procurement order created any contractual obligation on the Government. We are of the opinion that the said procurement order in paragraph 3 obligated the Government to furnish to the claimant certain materials therein called for, and that, if by audit, it should appear that the said materials the Government agreed to furnish were not so furnished then that the claimant should be reimbursed for all materials it was compelled to furnish for the completion of the said procurement order that, under the terms of same, should have been furnished by the Government.

It is, however, suggested that, in any settlement under this procurement order, that the set-up or audit heretofore made in the settlement of Contract G1397-764A should be given full consideration, as it may be that a proper audit of that contract will show that the allocation from that contract of Government materials fulfilled any obligation that may have been imposed on the Government by the said procurement order.

DISPOSITION.

This Board will make up and transmit a statement of the nature, terms, and conditions of the agreement and certificate Form "C" to the Ordnance Section, War Department Claims Board, for action in accordance therewith.

Lieut. Col. McKeeby and Lieut. Hendon concurring for the appeal section; Col. Morrow concurring for the War Department Claims Board.

NOVEMBER 29, 1920.

Case No. 3033.

In re **CLAIM OF NORFOLK & SOUTHERN RAILROAD CO.**

1. **AGENCY.**—Where a representative of the United States Railroad Administration, at the request of a bureau of the War Department, places an order for material for the War Department, such representative of the United States Railroad Administration becomes an agent of the War Department.
2. **CLAIM AND DECISION.**—Claim for nine (9) sets of switch timbers for No. 8 turnouts ordered by a representative of the United States Railroad Administration for T. N. T. plant at Perryville, Md., at the request of the Construction Division. Held, claimant entitled to relief.

Capt. Taylor writing the opinion of the Board.

FINDINGS OF FACT.

The Appeal Section finds the following to be the facts:

1. On November 12, 1920, this claim was forwarded to the Appeal Section by the Construction Division for consideration as a class B claim under the act of March 2, 1919.

There has been no formal statement of claim filed by claimant, but the claim was informally presented to the United States Railroad Administration, and upon request of the Construction Division was forwarded to it on March 1, 1920.

2. On October 15, 1918, Maj. H. D. Rawson, Q. M. C., of the Construction Division, U. S. Army, issued "Purchase Authorization No. 2, T. N. T. Plant, Perryville, Md.," which, among other items, included "24 sets of switch timbers for No. 8 turnouts" to be consigned to the United States Constructing Quartermaster, account Fred T. Ley & Co., at Perryville, Md., delivery, if possible, on or before November 10, 1918.

3. On October 19, 1918, Capt. C. B. Kennedy, Q. M. C., of the Construction Division, telephoned the Forest Products Section, Division of Purchase, United States Railroad Administration, and requested that 24 sets of switch timbers for No. 8 turnouts be shipped to the constructing quartermaster, account Fred T. Ley & Co., T. N. T. Plant, Perryville, Md. On the same date Mr. C. O. Deabler, of the Forest Products Section, United States Railroad Administration, telegraphed Mr. F. H. Fechtig, chairman of the Regional Purchasing Committee, United States Railroad Administration, Healey Building,

Atlanta, Ga., requesting that 24 sets of switch timbers for No. 8 turnouts be shipped to the constructing quartermaster, account Fred T. Ley & Co., T. N. T. Plant, Perryville, Md. Mr. Fechtig finally placed the order with the Norfolk & Southern Railroad Co. on October 22, 1918, and advised the Forest Products Section, United States Railroad Administration, to this effect, and on November 4, 1918, Mr. Deabler advised Capt. Huff, of the Construction Division, that the ties would be supplied at \$31.75 per thousand feet.

4. The Norfolk & Southern Railroad Co. placed the orders for the 24 sets of No. 8 turnouts with mills on its line. On November 1, 1918, an order for six (6) sets was placed with Mr. J. M. Brown, of Hemp, N. C., and on the same date an order for five (5) sets was placed with Mr. J. R. Wallace, of Troy, N. C., and the balance of the order was placed with other mills, but no claim has been presented based on orders which were placed with any of the mills except Mr. Brown and Mr. Wallace.

5. On November 5, 1918, the purchase authorization for the ties in question was canceled by the Construction Division. Apparently this was due to the fact that no appropriation had been made for the proposed T. N. T. Plant at Perryville. The Forest Products Section of the United States Railroad Administration was notified by telephone of the cancellation of this authorization on November 5, 1918, and on November 6, 1918, the cancellation was confirmed by letter from Capt. G. N. Chambers, of the Construction Division. Notice of the cancellation was passed down the line and reached Mr. Brown and Mr. Wallace, November 7, 1918. Of the six (6) sets to be furnished by Mr. Brown, two (2) were loaded and shipped November 4, 1918, and the other four (4) sets had been cut and were on the siding at Putnam, N. C., ready to be loaded when Mr. Brown was notified of the cancellation. It appears that Mr. Brown has been paid for the two (2) sets he actually delivered, and he has filed a claim against the Norfolk & Southern Railroad Co. for the four (4) sets which were cut but not delivered. His claim against the Norfolk & Southern Railroad Co. is for \$335.42 and interest from November 8, 1918. From the record it appears that the ties are still at Putnam, N. C.

When Mr. Wallace received notice of the cancellation November 7, 1918, he had already cut the five (5) sets allocated to him by claimant, but had not loaded them. The record indicates that these ties are still on the right of way at Arn Siding south of Troy, N. C. Mr. Wallace has filed a claim against the Norfolk & Southern Railroad Co. for these five (5) sets of ties in the sum of \$419.28 and interest from November 8, 1918. Claimant apparently has not paid either Mr. Brown or Mr. Wallace. The ties have not been used by claimant because they were cut to unusual sizes.

6. While no formal presentation of this claim was made to the War Department prior to June 30, 1919, the correspondence in the files of the Construction Division shows that repeated efforts were made by the United States Railroad Administration prior to June 30, 1919, to obtain a settlement with the Construction Division of the claims growing out of this transaction.

DECISION.

1. The Appeal Section finds: (1) That Mr. F. H. Fechtig, chairman of the Regional Purchasing Committee, United States Railroad Administration, was acting as the duly authorized agent of the Construction Division, United States Army, when on October 22, 1918, he placed an order with the Norfolk & Southern Railroad Co. for 24 sets of switch timbers for No. 8 turnouts to be shipped to the constructing quartermaster account Fred T. Ley & Co., T. N. T. plant, Perryville, Md.; (2) that an informal agreement was entered into between the claimant and the United States by the terms of which claimant was to furnish to the United States 24 sets of switch timbers for No. 8 turnouts at \$31.75 per thousand feet; (3) that it is such an agreement as the Secretary of War is, under the act of March 2, 1919, authorized to adjust, pay, or discharge upon a fair and equitable basis.

2. The Appeal Section holds that there was a sufficient presentation of this claim prior to June 30, 1919, to comply with the requirements of the act of March 2, 1919, relative to the date of filing.

DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate, Form C, to the Construction Section, War Department Claims Board, for action in the manner provided in Subdivision C, section 5, Supply Circular No. 17, Purchase, Storage, and Traffic Division.

Lieut. Col. McKeeby and Lieut. Hendon concurring for the appeal section; Col. Morrow concurring for the War Department Claims Board.

NOVEMBER 29, 1920.

Case No. 1779.

In re **CLAIM OF PFAU MANUFACTURING CO.**

MATERIALS—RETENTION OF SKILLED LABOR.—Where claimant was engaged in the production of plane tables and its contract was about to expire, and it applied to the Government for a new contract and was advised that same would come through shortly, and during the conversation claimant was told not to discharge its force but to keep the same intact, and to proceed to get the necessary material and supplies for continued production, an agreement was thereby entered into between the claimant and the Government whereby the Government is obligated to pay to claimant the reasonable expenditures made in complying with such request.

COMMITMENTS.—Where claimant was told by a contracting or negotiating officer that a contract for additional plane tables was coming through and claimant thereupon made commitments with certain compass manufacturers, there is an agreement whereby the United States is obligated to pay claimant for such reasonable commitments as were made on the faith of the said agreement.

Maj. Farr writing the opinion of the Board.

ON RECONSIDERATION.

1. This claim was originally filed with the Ordnance Claims Board prior to June 30, 1919, as a Class A claim, and, under date of August 8, 1919, was transmitted by said Board to the Board of Contract Adjustment. On the 9th day of January, 1920, claimant had a formal hearing before the said Board, which rendered an opinion on March 17, 1920, unfavorable to claimant. Claimant thereupon filed a petition for rehearing, together with its formal brief in support thereof. The matter was referred to the rehearings committee which, under date of May 20, 1920, refused to reconsider the said decision and claimant thereupon, under date of June 1, 1920, served notice on the Board of its appeal to the Secretary of War. On June 7, 1920, the decision of the Board of Contract Adjustment, together with the files and the accompanying papers, were forwarded to the War Department Claims Board for transmission to the Secretary of War in accordance with claimant's appeal.

2. The matter was then referred to the Special Advisers of the Secretary of War who submitted the following memoranda:

"Had the armistice not been agreed to when it was and had hostilities continued a few months longer, there can be little doubt on the record here that claimant would have received a written contract for plane tables, maybe 6,440 of them, maybe more or less; that it would have manufactured and delivered the same and been paid therefor. Had that been so, claimant would have sustained no loss and would have presented no claim.

"As events turned out claimant did sustain losses partly from keeping on hand a skilled and organized force ready, whenever orders might come in, to get at once to work and fill them; partly also through the purchase of parts essential to the production of plane tables, which parts it could not use for government work, because no more government work was ever ordered.

"In order to recoup itself for such losses its claim was filed and came eventually before the Board. That claim is that prior to Nov. 12, 1918, and about Oct. 15, 1918, it entered into an agreement with an officer or agent acting under authority, whereby it was to manufacture 6,440 plane tables at \$32 each. The theory is the familiar one that, through conversations with a negotiating officer, apparently clothed with authority, an oral agreement was entered into for the purchase of these plane tables, the same to be subsequently reduced to writing in the form of a purchase order or a formal contract.

"The Board reached the conclusion that no such oral agreement was entered into, and after a careful examination of the testimony and appellant's brief, I concur in that conclusion; indeed I should infer from the brief that appellant does not dispute the proposition that the Board properly rejected the formal written claim which was filed under the Dent Act and which in due course came before the Board for its consideration. Why then is this appeal taken?

"There is a great deal of testimony and it is contended that it shows the making of a different oral agreement from that set out in the claim. The theory is this:

"Claimant was practically the sole source of supply of plane tables, a plane table being a necessary part of a machine gun. It had prior contracts with the Government which were nearly completed. It came to the officer in charge of the procurement of such articles and informed him that unless it received additional orders for plane tables it would be compelled to let its experienced help go and sever connection with the instrument maker from which it got the compasses (an essential part of the plane table) and who was being pressed to offer his compasses to the Shipping Board instead of claimant.

"Such a course on the part of the claimant would have been embarrassing for the Government. There was no other company manufacturing plane tables for the machine gun branch; bids had been advertised for and requests sent to practically all of the standard instrument manufacturers and they replied that in some cases their deliveries would extend over a period of almost three years to manufacture the quantity that was wanted. In the opinion of the officer in charge it was inadvisable to have claimant disband its organiza-

tion; it would mean a break in production so that when some hurry call came through it might not be filled. And a hurry call for machine gun parts might come at any moment. Failure to keep its connection with the compass makers and thus losing control that supply was also a disturbing element. That under these circumstances, as Mr. Pfau testified, Captain Shepherd said 'Order material, keep your men on, keep your women on, and do not let them go, because we are going to look to you for making these things.'

"The Dent Act is not confined to agreements for the production or purchase of supplies; it expressly enumerates 'agreements for the acquisition or control of equipment, materials, or supplies.' It is contended that an agreement of the sort set forth above is an agreement for the acquisition or control of equipment, materials, or supplies. Certainly this would be so as to the compasses, and, in my opinion, a fair and reasonable construction of the word 'equipment' would cover a selected force of skilled workmen, whose existence in an organized body, subject to control, would make the manufacturer who controlled them much better equipped to carry out the obligations of his contract with dispatch.

"I find the evidence to the effect that such an agreement to acquire and control equipment and supplies was in fact made to be quite persuasive, and am inclined to the conclusion that it would reasonably be supposed by claimant that Capt. Shepherd had authority to make such an agreement. But there are no such issues presented by this claim. If the practice allows as radical an amendment as this to be made to a claim, I recommend that claimant be allowed to amend, but if the claim be thus amended I recommend that the case thus presented be sent to the Board for trial. It has never had these new issues before it, having been concerned only with an agreement for the manufacture and sale of plane tables, and neither the claimant nor the Government tried the case on any such theory.

Sept. 13, 1920.

(Sgd.)

E. HENRY LACOMBE,
Special Adviser."

SEPTEMBER 21, 1920.

"I recommend that this record be returned to the Appeal Section, War Department Claims Board, with instructions to grant claimant leave to amend the claim in the manner referred to in the foregoing memorandum of Judge Lacombe, claimant to be permitted thereafter to offer such further evidence as it may desire to produce with regard to the amended claim.

((Sgd.) R. C. GOODALE."

3. Under date of September 21, 1920, the file, together with the accompanying papers, were returned to this Board with the following order of the Secretary of War:

"Upon consideration of the record in this matter, it is hereby directed that further proceedings be had by the Board of Contract Ad-

justment in accordance with the accompanying recommendations of the Special Advisers.

(Sgd.)

NEWTON D. BAKER,
Secretary of War."

4. Thereupon on October 21, 1920, claimant was allowed to amend its former petition by filing an amended statement of claim, Form B, the said amended petition alleging, among other things, that claimant entered into an agreement with an officer or agent acting under the authority, direction, or instruction of the Secretary of War (President of the United States) for—

"(a) Control or acquisition of claimant's equipment, materials, and supplies necessary and useful in and about manufacture of plane-tables, meaning specifically, Claimant's existing and functioning organization of skilled workmen, or men and women, experienced in work on plane-table and parts thereof; also Claimant's established trade-connections with manufacturers of compasses (an essential part of the plane-table) and Claimant's outstanding and further requisitions or orders for necessary compasses; also Claimant's supplies of direct and indirect raw material and parts on hand and in course of manufacture, and Claimant's trade-connections and requisitions or orders placed or to be placed with manufacturers and suppliers of divers other articles, commodities, and services necessary and requisite for manufacture by Claimant at its Plant of plane-tables of the kind and character called for under set of plane-tables specifications then and theretofore adopted and prescribed by United States Government through its officer in charge of the procurement of such articles for the Small Arms Division in the War Department, all as appears more particularly specified and established by proofs taken in case No. 150-C-1779, Board of Contract Adjustment, and by memorandum-opinion thereon rendered on appeal by the Special Advisers to the Secretary of War in said case."

5. This claim is therefore presented on the original file and evidence that was first presented to this Board, the memoranda of the Special Advisers, the order of the Secretary of War, and an affidavit bearing date, the 27th day of October, 1920, from Lawrence V. Shepherd which, among other things, contains the following statement:

"Affiant further deposing states that The Pfau Manufacturing Company was practically the sole source of supply of plane tables, a plane table being a necessary part of a machine gun (Unit of Equipment). The Pfau Manufacturing Company had prior contracts with the Government which were nearly completed. Charles Pfau, President of the Company, came to Affiant as officer in charge of the procurement of plane tables and informed Affiant that unless the company received additional orders for plane tables it would be compelled to let its experienced help go and sever connections with the instrument maker from whom the company got the compasses (an essential part of the plane table) and who was being pressed to offer his compasses to the Shipping Board instead of to The Pfau

Manufacturing Company. Such a course on the part of the Company would have been embarrassing for the Government. There was no other company manufacturing plane tables for the Machine Gun Branch; bids had been advertised for and requests sent to practically all of the standard instrument manufacturers, and they replied that, in some cases, their deliveries would extend over a period of almost three years to manufacture the quantity that was wanted. In Affiant's opinion it was inadvisable to have The Pfau Manufacturing Company disband its organization; it would mean a break in production so that when some hurried call came in it might not be filled. A hurried call for machine gun parts might come at any moment. Failure to keep the company's connection with the compass makers and thus losing control of that supply was also a disturbing element. That under these circumstances Affiant recalls having said, on or about October 1st, 1918, to Charles Pfau, President of The Pfau Manufacturing Company:—"Order material, keep your men on, keep your women on and do not let them go (I do not recall having used these exact words, but they form the substance of our conversation, as near as I can remember. L. V. S.), because we are going to look to you for making these things." Affiant further deposing, states that The Pfau Manufacturing Company was a contractor who was dealt with for hire and for compensation, who was never expected to work without pay, or to hazard its investment, or to gamble its recompense, in carrying out the wishes of the Department as they were or had been doing."

The portions of the affidavit in bracket are interlineations made by Lawrence V. Shepherd. The affidavit seems to have been prepared and forwarded to him and he signed and swore to the same after making the interlineations as indicated by the language in the brackets. Capt. Shepherd at the time of the negotiations was a captain in the Ordnance Department.

DECISION.

1. In view of the foregoing order of the Secretary of War, the memoranda of the Special Advisers and the affidavit of Capt. Lawrence V. Shepherd, this Board is of the opinion that there was an agreement entered into between the claimant and Capt. Lawrence V. Shepherd on or about the 1st of October, 1918, whereby claimant agreed to keep intact its force of skilled labor and to secure materials and supplies in order that it might be in a position to continue the making of the plane tables, the price of the same to be subject to adjustment when it was finally decided what kind of material should be used in making the sack or bag in which the said plane tables were carried, and that by reason of same there resulted an agreement that under the provisions of the act of March 2, 1919, the Secretary of War is authorized to adjust or settle upon a fair and equitable basis.

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DISPOSITION.

This section will make up and transmit a statement of the nature, terms, and conditions of the agreements and Certificate, Form "C," to the Ordnance Section, War Department Claims Board, for action in accordance therewith.

Lieut. Col. McKeeby and Capt. Woodfin concurring for the appeal section; Col. Morrow concurring for the War Department Claims Board.

DECEMBER 1, 1920.

Case No. 2867.

In re **CLAIM OF THE ATCHISON, TOPEKA & SANTA FE R. R. CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

Upon appeal to the Secretary of War the decision of the Appeal Section, War Department Claims Board, dated September 10, 1920, denying relief, was affirmed. (See Vol. VII, p. 577.)

After consideration of the record in the case the decision of the Appeal Section, War Department Claims Board, is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

DECEMBER 1, 1920.

Case No. 2549.

In re **CLAIM OF THE HAYNES AUTOMOBILE CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

On appeal to the Secretary of War the decision of the Board of Contract Adjustment, dated May 18, 1920, denying relief, was affirmed. (See Vol. V, p. 475.)

After consideration of the appeal and record in the case the decision of the Board of Contract Adjustment is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

DECEMBER 4, 1920.

Case No. 2749.

In re **CLAIM OF A. C. MESSLER CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

This claim was decided by the Board of Contract Adjustment June 23, 1920, relief being denied. Claimant appealed to the Secretary of War, who, on December 4, 1920, approved and affirmed the decision of this Board. (See Vol. VI, p. 504.)

Upon consideration of the record presented, the accompanying decision of the Board of Contract Adjustment is hereby approved and affirmed.

NEWTON D. BAKER,
Secretary of War.

DECEMBER 7, 1920.

Case No. 1986.

In re **CLAIM OF BIGGAM TRAILER CORPORATION.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

See these decisions, Volume VI, page 581, and Volume VII, p. 553.

Upon consideration of the appeal and record in the foregoing case I am convinced that the decision of the Board of Contract Adjustment of June 30, 1920, as amended by the decision of the Appeal Section, War Department Claims Board, on August 26, 1920, is correct, and relief in addition to that therein granted is denied.

NEWTON D. BAKER,
Secretary of War.

DECEMBER 8, 1920.

Case No. 1672.

In re **CLAIM OF AMERICAN STEEL & WIRE CO.**

This claim was decided by the Board of Contract Adjustment May 15, 1920, relief being denied. On appeal to the Secretary of War the decision of the Board denying relief was remanded to the Board for further proceedings. (For decision of May 15, 1920, see Vol. V, these decisions, p. 426.)

ON APPEAL BEFORE THE SECRETARY OF WAR.

Upon consideration of the appeal and record in this case I can not concur in the view of the Board of Contract Adjustment in its decision of May 15, 1920, that the contract was free from ambiguity and that contractor is expressly bound by the contract irrespective of the evidence, to do the work of assembling. I do not desire at this time to determine whether or not the duty of assembling the parts was included in the formal contract dated April 13, 1918; I simply hold that the contract was ambiguous and direct further proceedings accordingly. The decision of the Board of Contract Adjustment will be vacated and further proceedings had.

NEWTON D. BAKER,
Secretary of War.

DECEMBER 8, 1920.

Case No. 2810.

***In re* CLAIM OF CHARLES SCHAEFER & SONS.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

(For statement of facts and decision, see Vol. VII, p. 796.)

Upon consideration of the appeal and record in this case I am convinced that claimant is not entitled to recover, and final order denying relief so far as the War Department is concerned, is hereby entered.

NEWTON D. BAKER,
Secretary of War.

DECEMBER 9, 1920.

Case No. 2999.

***In re* CLAIM OF WOOD ART MACHINE CO.**

This claim was disposed of by the Appeal Section, War Department Claims Board, November 15, 1920, by denying relief. On appeal to the Secretary of War this decision was affirmed. (For statement of facts and decision, see Vol. VIII, p. 163.)

ON APPEAL BEFORE THE SECRETARY OF WAR.

Upon consideration of the appeal and record in the above-entitled case I am convinced that the action of the Appeal Section, War Department Claims Board, is correct and final order denying relief by the War Department is hereby entered.

**NEWTON D. BAKER,
*Secretary of War.***

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DECEMBER 14, 1920.

Case No. 2779.

In re **CLAIM OF VIRGINIA RED OIL PRODUCTS CO.**

On August 3, 1920, the Appeal Section, War Department Claims Board, issued a decision in the above-entitled case denying relief. Upon application of claimant a rehearing was held on September 13, at which time it was determined that the former decision should be reaffirmed. Claimant then appealed to the Secretary of War, who, on December 14, 1920, affirmed the decision of the Appeal Section, War Department Claims Board. (For full statement of facts, see Vol. VII, p. 213, and Vol. VII, p. 695.)

ON APPEAL BEFORE THE SECRETARY OF WAR.

In the foregoing case of the Virginia Red Oil Products Co. the action of the Appeal Section, War Department Claims Board, in denying relief is affirmed and final order denying relief so far as the War Department is concerned is hereby entered.

NEWTON D. BAKER,
Secretary of War.

DECEMBER 16, 1920.

Case No. 2677.

In re **CLAIM OF JOLIET FORGE CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

This case was decided by the Appeal Section, War Department Claims Board, July 31, 1920, relief being granted in part. On appeal to the Secretary of War, decision affirmed. (See Vol. VII, p. 150.)

Upon consideration of the appeal and record in the above-entitled case the action of the Appeal Section, War Department Claims Board, is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

DECEMBER 16, 1920.

Case No. 2843.

In re **CLAIM OF NORTH STAR CHEMICAL WORKS.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

Upon appeal to the Secretary of War the decision of the Appeal Section, War Department Claims Board, dated October 1, 1920, was affirmed. (See Vol. VII, p. 788.)

Upon consideration of the appeal and record in the above-entitled case I hereby affirm the action of the Appeal Section, War Department Claims Board, denying relief.

NEWTON D. BAKER,
Secretary of War.

DECEMBER 16, 1920.

Case No. 2651.

In re **CLAIM OF UNITED GAS & ELECTRIC ENGINEERING CORP., NEW YORK CITY.**

ON APPEAL TO THE SECRETARY OF WAR.

On July 15, 1920, the Appeal Section, War Department Claims Board, rendered a decision denying relief in above-entitled claim, and on appeal the Secretary of War, on December 16, 1920, affirmed this decision. (See Vol. VII, p. 40.)

Upon consideration of the appeal and record in this case the decision of the Appeal Section, War Department Claims Board, is affirmed.

NEWTON D. BAKER,
Secretary of War.

DECEMBER 18, 1920.

Case No. 2879.

In re **CLAIM OF THE CHICAGO, MILWAUKEE & ST. PAUL R. R. CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

This claim was disposed of by the Appeal Section, War Department Claims Board, September 1, 1920, by denying relief to claimant (Vol. VII, p. 540). On appeal to Secretary of War, decision affirmed.

In the foregoing case, upon consideration of the appeal and record, I am convinced that the action of the Appeal Section, War Department Claims Board, denying relief is correct and the same is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

DECEMBER 18, 1920.

Case No. 2470.

***In re* CLAIM OF RAYMOND ENGINEERING CORPORATION, NEW YORK, N. Y.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

On June 24, 1920, the Board of Contract Adjustment rendered a decision denying relief in above case. Claimant appealed to the Secretary of War, who, on December 18, 1920, affirmed the decision of the Board. (See Vol. VI, these decisions, p. 510.)

Upon consideration of the record presented, the accompanying decision of the Board of Contract Adjustment is hereby approved and affirmed.

NEWTON D. BAKER,
Secretary of War.

DECEMBER 18, 1920.

Cases Nos. 2059 and 2061.

In re **CLAIMS OF WRIGHT WORKS.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

These claims were disposed of by the Board of Contract Adjustment April 3, 1920, by denying relief to claimant (Vol. IV, p. 850). Claimant appealed to the Secretary of War, who, on the 18th day of December, 1920, affirmed the decision of this Board.

Upon consideration of the appeal and record in the above-entitled cases, I am convinced that relief should not be granted, and the action of the Board of Contract Adjustment denying relief is, therefore, affirmed.

NEWTON D. BAKER,
Secretary of War.

DECEMBER 20, 1920.

Case No. 2916.

In re **CLAIM OF ROME BRASS & COPPER CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

For decision of Appeal Section, War Department Claims Board, dated August 17, 1920. (See Vol. VII, these decisions, p. 327.)

Upon consideration of the record and appeal in the above-entitled case, the decision of the Appeal Section is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

DECEMBER 21, 1920.

Case No. 2785.

In re **CLAIM OF WESTERN CARTRIDGE CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

Upon appeal to the Secretary of War the decision of the Appeal Section, War Department Claims Board, was affirmed. (See Vol. VII, p. 359.)

Upon consideration of the appeal and record in the foregoing case, I am convinced the decision of the Appeal Section, War Department Claim Board, is correct and the same is approved.

NEWTON D. BAKER,
Secretary of War.

DECEMBER 21, 1920.

Case No. 2318.

In re CLAIM OF WISCONSIN MOTOR MANUFACTURING CO.

ON APPEAL BEFORE THE SECRETARY OF WAR.

Upon appeal to the Secretary of War the decision of the Board of Contract Adjustment, dated March 29, 1920, denying relief, was affirmed. (See Vol. IV, p. 733.)

Upon consideration of the appeal and record in this case, the action of the Board of Contract Adjustment denying relief is affirmed.

NEWTON D. BAKER,
Secretary of War.

DECEMBER 22, 1920.

Case No. 1933.

In re **CLAIM OF A. C. LAWRENCE LEATHER CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

Decisions were rendered in this case by the Board of Contract Adjustment on May 6, 1920 (Vol. V, p. 183), and by the Appeal Section, War Department Claims Board, on November 6, 1920 (Vol. VIII, p. 142). On appeal to the Secretary of War the decision of the Appeal Section, War Department Claims Board, was affirmed.

Upon consideration of the appeal and record in this case, I am convinced that the action of the Appeal Section, War Department Claims Board, in denying relief is correct.

NEWTON D. BAKER,
Secretary of War.

DECEMBER 22, 1920.

Case No. 2911.

In re **CLAIM OF ROLLIN CHEMICAL CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

This claim was decided by the Appeal Section, War Department Claims Board, November 9, 1920, by denying relief to claimant. Claimant appealed to the Secretary of War who, on December 22, 1920, affirmed the decision of this Board. (Vol. VIII, p. 129.)

Upon consideration of the record and appeal in the case, the decision of the Appeal Section, War Department Claims Board, is affirmed.

NEWTON D. BAKER,
Secretary of War.

DECEMBER 23, 1920.

Case No. 1764.

In re **CLAIM OF J. & F. GOLDSTONE & CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

For decision of Board of Contract Adjustment dated March 20, 1920, denying relief, see Volume IV, these decisions, page 535.

Upon consideration of the appeal and record in the foregoing case, I believe that the action of the Board of Contract Adjustment, denying relief, is correct, and the same is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

DECEMBER 24, 1920.

Case No. 1553.

In re CLAIM OF REMINGTON ARMS UNION METALLIC CARTRIDGE CO.

ON APPEAL BEFORE THE SECRETARY OF WAR.

For decision of Board of Contract Adjustment dated June 19, 1920, see Volume VI, page 968.

Upon consideration of the appeal and brief in the above-entitled case, I am convinced that the letter of the Appeal Section, War Department Claims Board, of October 9, 1920, is correct, and the same is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

APPEAL SECTION, WAR DEPARTMENT CLAIMS BOARD,
Washington, October 9, 1920.

From: War Department Claims Board, Appeal Section.

To: War Department Claims Board, Ordnance Section.

Subject: Claim of Remington Arms Co., 150-C-1523.

1. The War Department Claims Board, Appeal Section, has received your letter under date of October 7, 1920, together with the file of the Remington Arms Co., claim 150-C-1523.

2. This letter, together with the record in the case, was referred to Lieut. Col. McKeeby, chairman, Appeal Section, and he directs me to return the same to the Ordnance Section calling attention to the fact that paragraph 1 in your letter under date of October 7, 1920, states:

"* * * the Government should pay it the *exact amount which it spent and no more* and that the Remington Co. should receive for the facilities which it manufactures in its own plant the cost of manufacture, plus 10 per cent."

3. It is the opinion of the chairman that the paragraph you quote from the decision in case 150-C-1523 is so clear and distinct that it would be impossible for this section to set forth in further detail the exact meaning of the decision.

WAR DEPARTMENT CLAIMS BOARD, APPEAL SECTION,
By JOHN C. F. PALMER,
Captain, Adjutant General, Recorder.

DECEMBER 27, 1920.

Case No. 3024.

***In re* CLAIM OF DUSENBURG MOTORS CORPORATION.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

Upon appeal to the Secretary of War, decision of the Appeal Section, War Department Claims Board, dated November 15, 1920 was affirmed. (See Vol. VIII, these decisions, p. 161.)

On consideration of the appeal and record in this case the decision of the Appeal Section, War Department Claims Board, is affirmed.

NEWTON D. BAKER,
Secretary of War.

DECEMBER 28, 1920.

Case No. 2641.

In re **CLAIM OF MONMOUTH CHEMICAL CO., NEW YORK CITY, N. Y.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

This claim was decided by the Board of Contract Adjustment adversely to claimant on June 5, 1920. On appeal to Secretary of War, affirmed. (For decision of Board of Contract Adjustment, see Vol. VI, these decisions, p. 23.)

Upon consideration of appeal and record in the above-entitled case, the action of the Board of Contract Adjustment denying relief is affirmed.

NEWTON D. BAKER,
Secretary of War.

DECEMBER 29, 1920.

Case No. 2525.

In re **CLAIM OF HENDRIX COLLEGE, CONWAY, ARK.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

The Appeal Section, War Department Claims Board, rendered a decision in the above-entitled claim July 23, 1920, denying relief. On appeal to the Secretary of War this decision was affirmed. (See Vol. VII, p. 84.)

Upon consideration of appeal and record in the above-entitled case, the action of the Appeal Section, War Department Claims Board, denying relief is affirmed.

NEWTON D. BAKER,
Secretary of War.

DECEMBER 1, 1920.

Case No. 3027.

In re **CLAIM OF W. D. HAM.**

1. **REOPENING FINAL STATUTORY AWARD.**—Where a subcontractor for the manufacture of walnut gunstocks enters into agreements with producers of walnut logs and after the contract of the prime contractor is suspended on account of the armistice, the Ordnance Claims Board, in order to expedite the adjustment of the gunstock contracts enters into cancellation agreements with the walnut-log producers with the understanding that the amount agreed upon in settlement will be paid in cash, and afterwards the Ordnance officers and agents engaged in effecting settlement of the gunstock contracts by oversight omit to include the claims of the walnut-log producers in the claim of the subcontractor and a final statutory award is made the prime contractor, the mistake of the Ordnance officers, who are acting both for the Government and for the producers, is a mutual one, and because of such mistake the final statutory award should be reopened and a supplemental award made for the amount due the various producers.
2. **SAME.**—Even if the mistake of the Ordnance officers and agents in omitting the producers' claim from the final statutory award be not considered as a mutual mistake, yet under the circumstances of this case, where the producers were depending upon the Ordnance officers to do all things necessary to secure payment of the amount agreed upon as damages arising from the cancellation of their contracts, the final statutory award made to the prime contractor should be reopened and a supplemental award made for the various amounts due the producers. Such supplemental award is necessary to complete the adjustment of the prime contract and to make it a just and equitable settlement within the meaning of the Dent Act.
3. **CLAIM AND DECISION.**—Claim for \$1,490.57 for damages on account of the cancellation of walnut-log contracts. Held, that the final statutory award to the prime contractor should be reopened and supplemental award made.

Lieut. Col. Smith writing the opinion of the Board.

FINDINGS OF FACT.

1. This claim was forwarded to the Appeal Section by the War Department Claims Board "for consideration and determination of whether there is a class 'B' claim and appropriate action thereon." The claim was presented under unusual circumstances. It is entitled in the name of W. D. Ham. As a matter of fact the only financial interest Mr. Ham has in the claim is on account of a possible

contingent liability to some 20 producers of walnut logs, who are the real beneficiaries under the claim, with whom he contracted for walnut logs as the representative of the Williamson Veneer Co., because some of the contracts were in his name.

The Williamson Veneer Co. was a subcontractor under Frank Purcell of Kansas City, Kans., who had a contract with the Ordnance Department, dated about October 1, 1918, to furnish black walnut hand-guard blanks and gunstocks.

2. Subsequent to October 1, 1918, and prior to the armistice, Mr. Ham contracted with the various producers, whose names will be hereinafter mentioned, for walnut logs in various quantities. Shortly after the armistice the contract with Mr. Purcell was suspended. Instead of waiting for the walnut-log producers to prepare their claims for damages and present them through the Williamson Veneer Co. and Frank Purcell, the Ordnance Department, at a conference at which representatives of the Cincinnati, St. Louis, Chicago, Pittsburgh, and Rochester Ordnance district claims boards were present, decided to anticipate the filing of claims by the producers of walnut logs, in order to expedite the adjustment of the contracts for the gunstocks. Accordingly Capt. J. W. Powell, Small Arms Section, was placed in charge of the matter of investigation and preliminary negotiations looking to the adjustment of all walnut gunstock contracts. He was to check up the various contractors' inventories and commitments and make a report with recommendations to the proper district claims boards. Capt. Powell was to cause each producer to be interviewed, in order to learn the nature and amount of his claim. A report of the conference above mentioned was made January 2, 1919, by C. L. Harrison, Cincinnati District Chief of Ordnance, to Gen. Peirce, Claims Board, Army Ordnance, Washington, D. C.

3. Thereafter under the direction of Capt. Powell the walnut logs and the standing timber, which had been sold to the Williamson Veneer Co., were inspected and scaled by ordnance inspectors.

At the request of Capt. Powell each of the producers, on various dates between February 4 and May 9, 1919, inclusive, made offers of settlement of the damages on account of the cancellation of their various walnut log contracts. The following is a table giving the names of the walnut log producers who contracted to furnish logs to the Williamson Veneer Co. through W. D. Ham, their addresses, the number of feet cut by each, and the number of feet of walnut standing timber contracted for, and the amount which each producer was willing to accept in settlement of his contract. In each case the walnut logs and standing timber was to be retained by the producer.

Name.	Address.	Cut.	Standing.	Proposal.
		<i>Feet.</i>	<i>Feet.</i>	
Franklyn Hess.....	Wapwollopen, Pa.....	1,168	1,980	\$40.00
William Harter.....	do.....	845		30.00
J. W. Readler.....	do.....	1,450	1,008	55.00
Steve Challis.....	Tunkhannock, Pa.....	2,641		130.00
Lewis B. Carter.....	Skinners Eddy, Pa.....	3,655		125.00
J. R. Frane.....	do.....		800	15.00
E. Gooding.....	Towanda, Pa.....	2,713		125.00
B. F. Brigham.....	Horn Brook, Pa.....		7,000	175.00
M. E. Storrs.....	Standing Stone, Pa.....	1,936		50.00
William Wenz.....	Allentown, Pa.....	3,324		125.00
Michael Connell.....	Kennett Square, Pa.....	562	1,080	25.00
William B. Smith.....	West Grove, Pa.....	116		5.00
Ellwood E. Chamber.....	Lincoln University, Pa.....	581	96	35.00
Mrs. Caroline E. Reynders.....	Sheshequin, Pa.....	2,867	300	150.00
Chester Heisler.....	Hickory Hill, Pa.....		3,408	75.00
E. W. Falck.....	Leetsdale, Pa.....	2,916		100.00
J. T. Bragg.....	Garretts Bend, W. Va.....		10,000	60.00
R. E. McNally.....	Roaring Springs, Pa.....	2,000		40.00
Black Planing Mill Co.....	West Chester, Pa.....	1,624		40.60
E. P. Wilkinson.....	Northbrook, Pa.....	1,638		89.97
Total.....				1,490.57

4. William M. Daily, an Ordnance Department auditor, was detailed to assist Capt. Powell in the investigation of the walnut log claims. He testified before the Appeal Section, War Department Claims Board, August 17, 1920, that these various claims amounting to \$1,490.57 were intended to be included in the claim of the Williamson Veneer Co., subcontractor under Frank Purcell, at the time the Purcell claim was presented, and

“Through a clerical error on my part I find it was omitted from my recapitulation of the Williamson Veneer Co.’s claim * * *. In making a recapitulation of the footage under the entire contract the footage of these particular items that were omitted was included in the total figures in balancing up, but the dollars and cents was not included in the Williamson Veneer Co.’s claim by error on my part in the recapitulation. * * * It is all shown here and it was distinctly understood by the lieutenants in the field, and the figures were available but were omitted in making the analysis.”

At this point in his testimony Mr. Daily was shown four sheets of paper writing which he identified as the papers showing the settlement. These sheets were copied into the transcript and are marked “Government Exhibit No. 1.” Three of the sheets referred to by the witness show the same facts as set out in the above table, each sheet being accompanied by a certificate; one certificate signed J. W. Stokes, deputy forest supervisor, certifies as to the correctness of the statement as to 16 of the walnut log producers. W. D. Brush, scientific assistant, Forest Service, certifies as to the correctness of the claim as to 2 producers. An unsigned certificate as to the Black Planing Mill Co. and E. P. Wilkinson, two of the above-named producers, recites that black walnut timber in the log was inspected by Charles D. Young.

5. Mr. F. J. O'Brien, examiner for the Claims Board, on May 2, 1919, recommended that certificate C be executed.

6. The Ordnance Claims Board issued its certificate C, which was accepted and approved by Frank Purcell, May 2, 1919. A final statutory award was made by the St. Louis ordnance district claims board under War Ord. Nos. P18037-2928SA and P18545-3001SA, which was accepted by Frank Purcell, August 22, 1919, and approved by the War Department Claims Board October 14, 1919. The award included an allowance on account of the Williamson Veneer Co., but did not include the items in question.

7. Shortly after this award it was discovered that the claims of the producers whose names appear in the above table had been omitted in the settlement upon which the final award was based. By letter dated December 12, 1919, T. L. Ames, colonel, Ordnance Department, acting chairman of the Claims Board, Ordnance Department, advised the chairman of the district Ordnance claims board, St. Louis, Mo., in part as follows:

"This matter has been presented to the Ordnance Claims Board, which has directed that these papers be referred to you with the request that you reopen the case of the Frank Purcell Co., only in so far as it pertains to the subcontractors innumarated in the attached letter of the small-arms division of December 6 (Oms. 411, 1/746), and that supplemental award be made to the Frank Purcell Co., providing for the payment in the sum of \$1,490.57 to the subcontractors who by mutual error were left out of the award previously made to the Frank Purcell Co."

The request of the Ordnance Claims Board, referred to in the above letter, is signed Herbert O'Leary, lieutenant colonel, Ordnance Department, chief, small-arms division, and is as follows:

"It is therefore requested that the Claims Board take early action through the appropriate channels to effect settlement."

8. In a letter to the St. Louis ordnance district claims board from Frank Purcell, inclosing an affidavit as to the correctness of these claims, it is stated that he (Purcell) trusted it would be sufficient to clear the matter so that claimants might obtain payments due them.

9. On November 5, 1919, W. M. Daily, the accountant whose testimony is referred to above, advised the chief of the small-arms division, Washington, D. C., as follows:

"1. Referring to your favor of November 1 relative to the item of cancellation cost of \$1,490.57 of the Williamson Veneer Co. claim, it appears to me as though this item was omitted from their claim through error. Personally I am at a loss to understand how this could have been done, as when Mr. Brown was there, the writer made the analysis as per statement attached, and he and I went over it very carefully in all detail.

"2. We also checked over the item of footage, which has actually been shown on the liability of the Williamson Veneer Co. The writer also talked to Mr. Ham and went over this statement very carefully, but evidently we overlooked this item. Mr. Brown's letter of May 29 specifies this cancellation proposal very distinctly, and as I can see the amount from the figures shown, this should have been added to the Williamson Veneer Co.'s claim.

"3. I trust that with this information at hand you will be able to make the necessary adjustment and regret that an error of this kind should appear after settlement had been made with this company."

10. On January 19, 1920, the Williamson Veneer Co. wrote Frank Purcell a letter, of which the following is the concluding paragraph:

"For your attention we would add that we did not take the matter up with you because shortly after the settlement of our claim we were advised by Washington that the omission had been discovered and would be adjusted in due course."

11. On February 13, 1920, the St. Louis Ordnance district claims board made a supplemental award for the items in question to Frank Purcell under War Ord. Nos. P18037-2928SA and P 18545-3001SA in the sum of \$1,490.57, supplementing the final award made said Frank Purcell for \$102,969.48, above referred to. It is recited in said supplemental award that it is made to adjust certain errors surrounding the issuance of said awards due to mutual mistake of fact and contrary to the intention of the parties. Said award further recites that \$55.15 thereof is chargeable against contract 18037-2928SA; the balance of the award is applicable and chargeable to contract P18545-3001SA; the Williamson Veneer Co., Baltimore, Md., contracted to furnish claimant on account of said contract an additional amount of 55,818 feet of lumber for which a cancellation charge is made of \$1,490.57, and that claimant had presented satisfactory evidence that this subcontractor has consented to look for payment to claimant only. This supplemental award has not been approved by the War Claims Board.

12. On February 20, 1920, Col. T. L. Ames, Ordnance, acting chairman, Ordnance Claims Board, by Wm. H. Kyle, examiner, forwarded the following recommendation to the War Department Claims Board:

"1. A resolution of this board, this date, all papers in this case involving the reopening of same to cover payment to Williamson Veneer Co. in the sum of \$1,490.57 are forwarded herewith, approval recommended."

13. No question has been raised as to the amount of the claim or the Government's liability therefor. Apparently the only reason that the Claims Board has not approved the supplemental award by

the St. Louis district claims board, acting by direction of the Ordnance Claims Board, is because the Claims Board has not been satisfied that there was in the record sufficient evidence of a mutual mistake to warrant the reopening of the final award in order to include the claim in question. This is indicated in the memorandum of Recorder Lansdale, dated March 8, 1920, and that of special member for ordnance, E. H. Van Fossan, dated March 9, 1920. On April 1, 1920, Mr. Van Fossan stated in a memorandum for the Ordnance Claims Board as follows:

"2. I have discussed the matter with Capt. McLaughlin and believe that upon preparation of a full statement setting forth the facts, properly authenticated by the contractor and the Claims Board, a case will be made out meriting the relief requested."

14. On March 30, 1920, by second indorsement to the Ordnance Claims Board, Bernard Whittaker, major, Ordnance Department, by order of the chief of manufacture, stated:

"2. This case has been most embarrassing to this division and the delay in action upon it has entailed a vast amount of explanation out of proportion to the amount involved. It is thought that every effort should be made to expedite payment to these persons as the noninclusion of these claims was purely a clerical error."

15. Pursuant to request from William H. Kyle, examiner, Ordnance Claims Board, attention Capt. McLaughlin, the Ordnance office small arms division on April 9, 1920, made a statement of the facts relative to the claim including the following statement:

"There is no doubt that agreements to cancel were made and that an injustice is being done the timber owners who agreed to these cancellations. While the Frank Purcell Co. and the Williamson Veneer Co. may be legally responsible for the fact that these claims were not included in their claim, the fact remains that the Ordnance Department sent its agents directly to these timber owners and induced them to cancel their contracts with the Williamson Veneer Co., upon the promise of a cash consideration, which was only a small percentage of the cash value of the timber contracted for. As the Government agents effected these cancellations and made the agreements, these claimants are looking to the Government for settlement, and can not understand why there should be any question as to their payment. The claim is supported by voluminous correspondence, all of which is certified to and most of which is sworn to.

* * * * *

"Capt. J. W. Powell, who had charge of the preparation of the recommendations for the settlement of these claims, was not acting as a representative of the small arms division, but with full authority of the Ordnance Claims Board and acted under their instructions in these matters."

16. On April 14, 1920, St. Louis claims board advised the Ordnance Claims Board in part as follows:

"2. * * * It will be noted that the district claims board did not request that this claim be reopened, but the action was taken as directed in the attached letter from the Ordnance Claims Board.

"3. Referring to the letter from Lieut. Col. O'Leary it is understood that representatives appointed by the Chief of Ordnance negotiated settlement with parties who contracted to furnish the Williamson Veneer Co. with walnut logs. When the claim was set up the Government representatives, who assisted in setting up the claimant, omitted the items now in question and the error was overlooked by Purcell. This error was found when payment was requested by the log owners for the amount for which they had agreed to settle, but, through no fault of theirs, no provision had been made for this amount in the claim.

"4. Referring to Maj. Whittaker's letter it is quite apparent that the mistake was caused by the Government through error of its representatives."

17. At the time Mr. Ham contracted with the walnut log producers to buy their logs, he was in possession of a letter signed "By order of Col. Trip. Respectfully, Hayden Eames, Major of Ordnance, R. C. By R. Lockey, Captain, Ord. R. C.," addressed "To whom it may concern," introducing Mr. Ham and stating that he represented the Williamson Veneer Co., which company was manufacturing walnut gun stock blanks for the United States Army rifle, and that "by selling your timber to the Williamson Veneer Co. you will help win the war."

18. On June 1920, Mr. E. H. Van Fossan, special member for ordnance, in a letter to the standing committee, War Department Claims Board, recited the facts on which the claim is based, and concluded his letter as follows:

"I am satisfied that the Government is obligated to the contractor in the amount claimed, and that the same has not been paid. Because this matter has been so long delayed it is hoped that it will not be necessary to procure additional data, but, if such is required, it will be undertaken. The St. Louis district board and the Ordnance Claims Board have each recommended approval. The matter is accordingly forwarded, recommending approval."

19. On July 9, 1920, Recorder Lansdale returned the papers to Mr. Van Fossan with a memorandum stating—

"This case should be disposed of under the opinion of the Attorney General."

A portion of the opinion of the Attorney General dated June 4, 1920, referred to in the recorder's letter is as follows:

"There is here no controversy. It is conceded that certain items of payment to which the contractors were entitled have been erroneously omitted from the awards. It would therefore be an idle form to remit the contractors to their remedy in the Court of Claims, where their contentions must be admitted by the Government.

"Whether in completing the adjustment, payment, or discharge of these agreements you exercise your authority by reopening the awards, or by making new awards to supersede the erroneous ones, or by allowing the present awards to stand and making supplemental awards, or by adopting any other similar procedure, is not of vital moment. Your procedure, whatever it may be, readily can be adapted to such accounting expedients as may be decided upon between you and the proper accounting and disbursing officials. This is a question of detail to be solved by agreement between the Secretary of War and the Comptroller of the Treasury, the principles hereinbefore outlined assuring you the right to complete your own awards."

20. On July 9, 1920, Recorder Lansdale stated in a memorandum to Mr. Van Fossan, after referring to the opinion of the Attorney General:

"Final awards (not settlement contracts) will be reopened only upon a clear and convincing showing of mutual mistake, as set forth in previous instructions, when such mistake is not the result of negligence on the part of claimant, and only when such reopening is necessary in order to avoid serious injustice, and then only in accordance with the opinion of the Attorney General."

21. On August 12, 1920, the claim was disallowed by the War Department Claims Board, and returned to the Ordnance Section for appropriate action. On October 25, 1920, the Ordnance Section requested that the claim be forwarded to the Appeal Section, and on October 28 the War Department Claims Board forwarded the record to the Appeal Section, as stated in paragraph 1 above.

DECISION.

1. There is, of course, no privity of contract between the walnut log producers and the Government, unless it be by reason of the cancellation agreements entered into by representatives of the Ordnance Department subsequent to the armistice. Such agreements not coming within the act of March 2, 1919, the Secretary of War would have no jurisdiction to adjust claims based on such agreements. However, it is clear that the producers of the walnut logs have valid claims against the Williamson Veneer Co., which in turn is entitled to be protected from such liabilities by Frank Purcell, the prime contractor, between whom and the Government there is privity of contract and to whom the Government is obligated under the Dent Act to make a just and equitable settlement, because of the termination of his contracts. In order for a settlement with Mr. Purcell to be a just and equitable one, it must include any sums for which he is liable, such as are in issue here, resulting from commitments of his subcontractor. Therefore, it is plain that the items involved in this claim should have been included in the claim of Williamson Veneer Co. and adjusted in the award of the St. Louis ordnance district

claims board under the Frank Purcell contracts. It is established beyond question that such was the intention of the Ordnance officers charged with the handling of the Purcell and Williamson claim, as well as the claims here in dispute, and that all parties interested believed for some time after the final award was made to Frank Purcell that the amounts due the 20 walnut log producers under their cancellation agreements were included in the award.

2. If the present status of these claims had resulted through the neglect of the walnut log producers themselves there might be a grave question as to whether the award should be reopened, but the Ordnance Claims Board in an effort to expedite settlements under the walnut gun stock contracts went directly to the walnut log producers and secured cancellation agreements from them upon promises of cash settlements, and the producers are guilty of no negligence in the matter.

3. There is a legal obligation as well as a moral obligation on the part of the Government under the facts of this case to pay the walnut log producers any damages, less prospective or anticipated profits they may have suffered on account of the cancellation of their contracts. Until these payments have been made by the Government it can not be said that the award made to Frank Purcell was a fair and equitable one within the meaning of the Dent Act.

4. The cancellation offers out of which these claims arise were made in good faith with the understanding that the amount agreed would be paid them in cash. These offers were made more than a year and a half ago, pursuant to the laudable plan of the Ordnance Claims Board to expedite the settlement of gun stock contracts. The contractors, as they were justified in doing, depended upon the Ordnance officials with whom they dealt to do all things which were necessary to bring about the payment of the cash agreed upon in the various offers of settlement. The Ordnance Department thereupon became in effect, if not in law, the agent of the producers to do the things which were necessary to bring about the payment of the amounts agreed on.

5. In the testimony of Auditor Daily taken before this section on August 17, 1920, there is ample evidence of such a mutual mistake as justifies the reopening of the Frank Purcell award, in view of all the circumstances of the case, including the fact that Ordnance Department officials acted in the premises both for the Ordnance Department and for claimants.

6. While the various amounts stated in the respective offers of settlement are not necessarily conclusive upon the Secretary of War, although made by his agents, yet, after more than a year and a half of investigation during which time no question has been raised as to the correctness of these claims, and their payment having been

recommended by various auditing and accounting agents and inspectors and by Ordnance officials familiar with such matters, and in view of all the facts contained in the records relative to these contracts and the amount of work done thereunder by the various contractors, this Board does not hesitate to find that the amounts claimed by the various contractors are reasonable, fair, and just.

7. The award to Frank Purcell should be reopened and a supplemental award made in the amount of \$1,490.57.

8. From what has been said it is apparent that the claim is not a class B Dent Act claim, because the only agreements directly with the Government out of which the claim may be said to arise are the settlement agreements entered into subsequent to the armistice.

DISPOSITION.

The Appeal Section, War Department Claims Board, hereby transmits its decision to the Ordnance Section for appropriate action.

Lieut. Col. McKeeby and Capt. Frazer concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

DECEMBER 2, 1920.

Case No. 2146.

***In re* CLAIM OF WEST STEEL CASTING CO.**

This claim was decided by the Board of Contract Adjustment on May 12, 1920, partial relief being granted. Said Board of Contract Adjustment attempted to make an award, which claimant refused to accept, and thereupon noted its appeal to the Secretary of War. The Secretary of War returned the said decision to the Appeal Section, War Department Claims Board, with the direction that the same be forwarded to the Ordnance Section, War Department Claims Board, for further action in accordance with the memorandum thereto attached.

(For statement of fact and decision, see Case No. 2146, decided May 12, 1920, Vol. V, p. 333.)

Maj. Farr writing the opinion of the Board.

ON RECONSIDERATION.

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, 1919, for \$63,113.85. The claim was originally heard and decided by the Board of Contract Adjustment on May 12, 1920. The Award Section of the said Board thereupon attempted to work out the amount that was due claimant under the said decision, the said amount offered by the said Award Section not being satisfactory to the claimant, claimant thereupon noted an appeal to the Secretary of War.

2. The matter was then referred to the vice chairman, War Department Claims Board, who submitted the following memorandum to the Secretary of War:

"This claim was originally decided by the Board of Contract Adjustment on May 12, 1920, the claim being for materials consisting of coal, coke, pig iron, and various ores claimant alleged it had on hand and had purchased at the request of Government officers, the decision being as follows:

"1. There was an implied agreement within the purview of the act of March 2, 1919, under which claimant was authorized and directed to procure, and did procure, sufficient raw materials and coke to keep its production at the quantities specified in its formal contract, and as modified by the supplement thereto of April 16, 1918, for the six months embraced in the winter period of 1918-19, which

agreement can be adjusted, paid or discharged by the Secretary of War.

“‘2. The fair and equitable basis on which payment of the claim, now asserted under the said agreement, should be made is to determine the quantities of raw materials and coke necessary for the agreed production for the six months’ period above defined and deduct therefrom the quantities used in the completion of the 4,000 sets of wheels embraced in the original contract. On the remaining quantities the claimant should be paid the difference between the cost or contract price and the market price as of a date reasonably subsequent to November 12, 1918.’

“Thereupon the said decision and file were forwarded to the district ordnance claims board at Cleveland, Ohio, and as that board had ceased to function was finally returned to the Board of Contract Adjustment with the suggestion that, as said Board had an award section, it proceed to make the necessary award.

“The Award Section of the Board of Contract Adjustment thereupon proceeded to make up an award basing the same partly upon an audit and report that had been filed with the Board under date of January 14, 1920, by one of its accountants, and under date of June 29, 1920, offered claimant the sum of \$4,245 in settlement of its claim, which claimant on July 6 refused to accept, and thereupon noted its appeal.

“The chief allegation on its appeal is that at the hearing before the Board of Contract Adjustment it was not allowed to offer any evidence as to its losses, and that the award made by the award section was thereby made without an opportunity for claimant to be heard, and further that the said award was not in accord with the decision of the Board of Contract Adjustment, and that it failed to take into consideration the sum of \$29,988.20 claimant was compelled to pay to cancel contracts it had outstanding for coke and other materials, and that the amount of depreciation allowed by said award section was based as of the depreciation in December, 1918, during which month the War Industries Board was still dictating the prices, and that the said prices were not indicative of the prices actually prevailing after the month of December, and that the prices prevailing after the month of December are the prices that should be used in figuring claimant’s loss, and that claimant should therefore have an opportunity to appear before the Board and give evidence showing what the prices were and what losses it suffered by reason of the decline in price of the materials and supplies it had ordered.

“Page 57 of the Transcript of the Record sustains claimant’s contention that it was not allowed to present any evidence at its hearing before the Board touching its losses, but was compelled to submit only evidence tending to show the existence of a contract. Maj. O’Neill, writing the opinion, made this statement:

“‘During the recess I have conferred with Col. Delafield with respect to a matter of practice. We will not take any testimony in this hearing with respect to the amounts that might be due under the contract if one is found. That will be for another board to determine. The testimony in this hearing will be confined to whether or not a contract was entered into and, if there was a contract, what was the nature, terms, and conditions of the contract.’

"Since the claimant was not allowed an opportunity to produce evidence tending to show its losses, and alleges it can submit evidence to prove the award as made up is in error, I am of the opinion that the award tendered claimant by the Award Section of the Board of Contract Adjustment should be set aside and vacated, and that the decision and file in this case should be transmitted by the Appeal Section to the Ordnance Section, War Department Claims Board before which claimant should be allowed to appear for the purpose of proving its losses, if any. I am further of the opinion that at such time the said ordnance section should take evidence to show whether or not the materials for which claimant is making claim were so used by it, that notwithstanding the decline in price of the same, there was no ultimate or final loss, in other words, that the claimant in using the said materials, coke and coal in its commercial work, actually suffered no loss, notwithstanding the fact that it could possibly have gone out into the open market and purchased materials at a less figure than those so used by it had cost, and if it should appear that the claimant by such use of material suffered no actual loss, then no award should be made covering the same.

"I am further of the opinion that when the Ordnance Section comes to take testimony and to audit this account, the fact that the claimant failed to cancel certain or all of its contracts for material and supplies until after the 1st of January, 1919, should be taken into consideration, for it may be that by such failure claimant was compelled to pay a higher cancellation price than if it had canceled its contracts for supplies and materials immediately after the armistice, and if it appears that by such delay in cancellation claimant was compelled to pay a sum in excess of that which it would have cost to have canceled these contracts prior to the date it did cancel, then in that event claimant should be granted no relief for such loss its action in not canceling immediately may have caused. It must have been apparent to claimant immediately after the signing of the armistice that it would receive no future contracts, and the mere fact that the Government allowed claimant to complete the contract it then had on hand for 4,000 sets of wheels did not in any way relieve it from the necessity of using every means at its command to minimize its losses. In any award offered claimant by the Ordnance Section due consideration should be given to the salvage offer made by said claimant for certain Government machinery now in its possession, as well as the amount of civilian business claimant was engaged in during November and December, 1918, and the amount of materials necessary to complete said orders."

3. Under date of November 20, 1920, the file, together with the accompanying papers, were returned to this Board with the following order of the Secretary of War:

"The case comes to me on appeal from an award made by the Award Section of the Board of Contract Adjustment granting claimant partial relief.

"Upon consideration of the record presented, it is directed that further proceedings be had in accordance with the attached memorandum of the vice chairman, War Department Claims Board."

4. By direction of the Secretary of War, as set forth in the foregoing order, the award rendered by the Award Section, Board of Contract Adjustment, is hereby set aside and vacated and the case is remanded to the Ordnance Section, War Department Claims Board, for appropriate action in accordance with the order of the Secretary of War.

Lieut. Col. McKeeby and Capt. Woodfin concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

DECEMBER 3, 1920.

Case No. 2255.

In re **CLAIM OF C. & C. RAINCOAT CO.**

1. CLAIM AND DECISION.—This claim was decided by the Board of Contract Adjustment in a supplemental decision dated June 19, 1920. Upon appeal to the Secretary of War by the vice chairman of the War Department Claims Board the decision of the Board of Contract Adjustment was reversed.

(For facts and decision and decision of Secretary of War, see Vol. VI, p. 983, and Vol. IV, p. 1021.)

FINAL ORDER DENYING RELIEF.

Whereas on June 19, 1920, the Board of Contract Adjustment of the War Department rendered a decision in the claim of C. & C. Raincoat Co., No. 2255, to the effect that the United States was obligated to reimburse claimant at the rate of 14 cents per garment on all raincoats manufactured after September 9, 1918, under proxy-signed contract No. 2060-B, dated April 19, 1918, and,

Whereas said decision of the Board of Contract Adjustment was referred to the Secretary of War by the War Department Claims Board, and,

Whereas on November 23, 1920, the Secretary of War rendered a decision in said above-mentioned claim reversing the decision of the Board of Contract Adjustment, dated June 19, 1920, and ordered that an order denying relief be entered in said claim for increase in price under proxy-signed contract No. 2060-B.

Now, therefore, pursuant to said order of the Secretary of War, the decision of the Board of Contract Adjustment rendered in claim No. 2255, June 19, 1920, and the accompanying certificate Form C, bearing the same date are hereby vacated and the relief prayed for is hereby denied.

GEO. L. McKEEBY,
Lieutenant Colonel, Judge Advocate, Chairman.

JOHN C. F. PALMER,
Captain, Adjutant General, Recorder.

DECEMBER 4, 1920.

Case No. 3018.

In re **CLAIM OF COMPAC TENT CO. (INC.).**

1. **BREACH OF CONTRACT.**—Where the Government notifies a contractor that a contract must be canceled claimant may refuse to accept the Government's notice as a breach and may consider the contract as still in existence.
2. **SAME—JURISDICTION.**—The Secretary of War has authority to enter into a supplemental agreement and pay a lump sum in settlement of unliquidated items arising from part performance of a contract after the contractor has been notified that the Government must cancel the contract.
3. **INFORMAL AGREEMENT.**—A Quartermaster Corps purchase order for \$32,405.62, dated June 20, 1917, providing for the manufacture and delivery of tent flies on or before November 7, 1917, constitutes an informal agreement under the act of March 2, 1919.
4. **CLAIM AND DECISION.**—Claim for \$16,380.51 for expenditures incurred in the performance of four purchase orders, one an informal agreement and the others coming within the exceptions to section 3744, Revised Statutes. Following the destruction of claimant's plant by fire the Government notified claimant that the purchase orders must be canceled. Held, claimant did not consider the Government's notice as a breach, and the Secretary of War therefore has authority to pay claimant for unliquidated items arising from part performance of purchase orders coming within exceptions to section 3744, Revised Statutes, and claimant is entitled to recover for the manufacture of tent flies actually delivered and constructively delivered prior to the date of fire and for obligations incurred in the performance of the purchase orders between the date of the fire and the date of receipt of notice of cancellation by the Government.

Maj. Miller writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim for \$16,380.51 involves a settlement of four purchase orders for tent flies issued claimant by the depot quartermaster, United States Army, at Jeffersonville, Ind., in June, August, and September of the year 1917.
2. Purchase Order No. 1885, dated June 20, 1917, covers 8,648 large wall-tent flies and 30 small wall-tent flies, the Government to furnish all the duck and No. 3 metallic tent slips, and the contractor to provide all other material and labor at \$3.74 each for the

large flies, a total of \$32,343.52; and \$2.07 each for the small flies, a total of \$62.10, delivery to be completed on or before November 7, 1917. This purchase order, therefore, is an informal agreement under the act of March 2, 1919. Purchase Order No. 1953, dated June 25, 1917, calls for 600 large wall-tent flies at \$4.90, a total of \$2,940, to be delivered within 42 days after receipt of material. Purchase Order No. 2855, dated August 13, 1917, provides for 120 small wall-tent flies at \$2.07 each, a total of \$248.40, to be delivered within 21 days after receipt of material. Purchase Order No. 3564, dated September 18, 1917, is for 200 small wall-tent flies at \$2.07 each, a total of \$414, to be completed within 4 days after receipt of material. Purchase Orders Nos. 1953, 2855, and 3564 state that the contractor shall furnish all labor and material except duck, which is to be provided by the Government. These three purchase orders come within the exceptions to section 3744, Revised Statutes. While Purchase Order No. 1885 must be adjusted under the act of March 2, 1919, and the other purchase orders are to be settled under the same conditions as formal contracts, it becomes necessary to consider the settlement of the four purchase orders as one claim, due to the fact that the contractor's commitments and expenses were made in connection with all of these orders, making it impossible for the contractor to allocate the proper portion of the claim, amounting to \$16,380.56, to each purchase order.

3. Each purchase order provided for the delivery of the completed tent flies f. o. b. Jeffersonville, Ind. Claimant's plant located at Indianapolis, Ind., was entirely destroyed by fire January 13, 1918. Prior to January 13, 1918, claimant had delivered to the Government 101 large flies and 29 small flies under Purchase Order No. 1885. Claimant had also notified the depot quartermaster prior to January 13, 1918, that 1,000 large tent flies were completed and ready for shipment, whereupon the Government instructed claimant to hold these 1,000 flies until further instructions.

4. The fire not only destroyed claimant's plant, machinery, and raw materials used in the performance of these agreements, but also burned 83,948 yards of 10-ounce duck furnished by the Government. Claimant collected insurance amounting to 80 per cent of the cost of this duck and, adding thereto from its own funds 20 per cent of the cost, remitted in full to the Government for the cost of the duck destroyed by fire.

5. Immediately after the fire of January 13, 1918, claimant secured a new location and incurred obligations for new equipment with which to complete the purchase orders, notifying the depot quartermaster, Jeffersonville, Ind., on January 14 or 15, 1918, to that effect, and at the same time requesting a further supply of the materials furnished by the Government. On January 19, 1918, the depot

quartermaster, Jeffersonville, Ind., sent claimant the following telegram, which was received by claimant the same day, signed "Hart per Volgenau":

"Have been advised by purchasing and manufacturing quartermaster's office that supply large wall-tent flies on hand is adequate for all requirements, therefore can not replace duck destroyed by fire and must cancel contract. Advise receipt."

6. Claimant did not treat this renunciation as an immediate breach, but since January 19, 1918, has insisted on a settlement which would give it a fair and just compensation covering losses sustained through the notice of January 19, 1918.

DECISION.

1. Since claimant did not accept the Government's notice of January 19, 1918, as breaches of the contracts, but still considers the contracts as in existence, the Secretary of War has power to enter into a supplemental agreement and pay a lump sum in settlement of unliquidated items arising from part performance of Purchase Orders Nos. 1953, 2855, and 3564. This is distinguished from unliquidated damages for the breach of a contract. (Burton's case 15, Dec. Compt., 439; S. & L. Cohen, case No. 1940, Vol. IV, Pt. III, p. 29, Decisions War Department Board of Contract Adjustment.)

2. Purchase Order No. 1885 must be settled in accordance with the act of March 2, 1919, and the Secretary of War has full authority to adjust this agreement. It has not been breached.

3. One hundred and one large tent flies and 29 small tent flies were delivered to the Government on Purchase Order No. 1885, for which claimant should receive payment at the prices stated in the purchase order if payment has not already been made for these delivered articles.

4. The Government's refusal to permit claimant to deliver 1,000 tent flies when they had been completed, coupled with the Government's request to claimant to retain these flies at claimant's plant for the Government, unquestionably constituted a constructive delivery to the Government. Claimant is therefore entitled to \$3.74 each on these 1,000 flies completed under Purchase Order No. 1885.

5. Claimant can not receive settlement for its expenses incurred prior to January 13, 1918, in connection with the purchase of machinery and material or for labor or overhead in manufacturing the balance of the ten flies. The facilities and the materials were destroyed, and the entire benefit arising through the expenditures for labor, overhead, etc., except as to 1,130 tent flies, was lost on account of the fire of January 13, 1918. The Government should share no part of this loss. However, claimant should be remunerated for

losses arising through the purchase of facilities and material, and for expenses for overhead, labor, etc., properly applicable to these purchase orders, between January 13, 1918, and the date of the receipt of the telegram of January 19, 1918. These were expenditures made and obligations incurred in the performance of the purchase orders. The settlement should be made as though claimant had delivered 1,130 flies and had incurred only those obligations and expenses arising since the fire on January 13, 1918, and prior to receipt of the Government's telegram of January 19, 1918, as to the balance of the tent flies.

DISPOSITION.

This Board will transmit to the Purchase Section, War Department Claims Board, a statement of the nature, terms, and conditions of the agreement, and certificate C covering Purchase Order No. 1885, together with a copy of this decision, for appropriate action.

Lieut. Col. McKeeby and Capt. Morgan concurring for the Appeal Section, Col. Morrow concurring for the War Department Claims Board.

DECEMBER 6, 1920.

Case No. Sales BCA-17.

In re **CLAIM OF AERONAUTICAL EQUIPMENT (INC.).**

1. CLAIM AND DECISION.—A decision in this case was rendered by the Board of Contract Adjustment of June 30, 1920, denying claimant relief. On appeal to the Secretary of War this decision was reversed and the claim was returned to the Board of Contract Adjustment for further consideration under direction of the Secretary of War. The former decision of the Board of Contract Adjustment was set aside and vacated and the record transmitted to the Ordnance Salvage Board in accordance with the directions of the Secretary of War. (For full statement of facts and former decision, see Vol. VI, p. 577.)

Maj. Blackburn writing the opinion of the Board.

FINDINGS OF FACT.

1. From a decision of the Board of Contract Adjustment, dated June 30, 1920 (Vol. VI, Pt. III, p. 24, Decisions of Board of Contract Adjustment) denying relief to claimant, an appeal was taken to the Secretary of War.

2. On November 23, 1920, the Secretary of War rendered the following decision:

“I do not concur in the views of the Board of Contract Adjustment as to the powers of the Secretary of War, and I direct that the decision in the above-entitled case be vacated.

“It is further directed that this case be transmitted to the Ordnance Salvage Board to state a debit and credit account and thereupon the entire file with such statement be transmitted to the Chief of Finance for appropriate action.”

3. The record has been returned to the Appeal Section, War Department Claims Board, for further consideration in the light of the decision of the Secretary of War.

DECISION.

Pursuant to the directions of the Secretary of War as set out in paragraph 2 of the findings of fact herein, the decision of the Board of Contract Adjustment in this case of date June 30, 1920, is set aside and vacated.

DISPOSITION.

The entire record in this case, together with a copy of this decision, will be transmitted to the Ordnance Salvage Board for consideration and action in accordance with the directions of the Secretary of War.

Lieut. Col. McKeeby and Capt. Marcum concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

DECEMBER 6, 1920.

Case No. 2874.

In re **CLAIM OF PORTER BROS. & COLLINS.**

This claim was decided by the Board of Contract Adjustment and forwarded to the Claims Board, Director of Purchase. Claimant was offered a settlement by the said Board, which it declined, and thereupon appealed to the Appeal Section, War Department Claims Board. Decision forwarded to Purchase Section for further action.

RELEASE FROM SUBCONTRACTORS.—This Board or any other claims board has no authority to demand that claimant shall, as a condition precedent to any offer of settlement or award, submit releases from all its subcontractors. The provisions of the Dent bill only require that before the payment of the award shall such releases be submitted. (For statement of fact, see Case No. 2358, Vol. V, p. 451.)

Maj. Farr writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim was originally decided by the Board of Contract Adjustment under date of May 18, 1920, being an appeal from the decision of the claims board, Office of Director of Purchase on a claim in the sum of \$10,166.02, arising out of a proxy signed contract, and was, in part, favorable to the claimant. The decision directed that the same be transmitted to the Office of Director of Purchase for appropriate action, to which board said decision and file were forwarded June 8, 1920.

2. The said claims board thereupon entered into negotiations with the claimant and offered it the sum of \$5,148 in settlement of its claim, the same being based on certain deductions from items A, D, and G of claimant's itemized statement of claim and the entire disallowance of item H of said claim. This proposed settlement not meeting the approval of claimant, it thereupon noted an appeal to the Board of Contract Adjustment, and under date of August 4, 1920, without any notice to claimant or opportunity for it to be heard, the Appeal Section of the War Department Claims Board, the successor to the Board of Contract Adjustment, rendered a decision sustaining the finding of the claims board, Officer of Director of Purchase in the sum of \$5,148. The claimant thereupon filed a notice with

the Appeal Section, asking that it be given a rehearing, alleging that it had had no opportunity to be represented before the said board on its appeal from the decision of the claims board, office of Director of Purchase. Under date of August 29, 1920 the said rehearings committee granted claimant a rehearing and on the 8th day of November, 1920, the claimant, in accordance with that permit, appeared before the Appeal Section and again presented its claim.

3. In the presentation of the claim before this section on the 8th day of November, 1920, the matters chiefly in dispute between the claimant and the Government representatives were as follows:

(1) Was the claims board; Director of Purchase, correct in disallowing item H of claimant's petition, the said item H being in the nature of an amended or supplemental statement, different in its set-up from the original petition as filed by the claimant, the claimant's contention being that the same should be accepted by the said board as a supplemental or an amended set-up of its claim, the allegation of the Government being that the same should not be so accepted, but that the claimant should be bound by its first set-up and allowed to present only evidence touching the first set-up.

(2) Can this section, or the claims board, Office of Director of Purchase, as a condition precedent to an offer of award or offer of settlement, compel claimant to secure releases from its subcontractors?

4. The evidence produced establishes the fact that the various expenditures alleged to have been made by the claimant had been checked by a government auditor, and that the said check had verified the said expenditures, except that under item F, amounting to \$1,789.45, the sum of \$500 had been disallowed, as the same was the cost of accounting or preparing the claim for presentation to the Board (p. 19 of transcript).

DECISION.

1. This Board is of the opinion that the claimant should be allowed to amend in the manner in which it has its item H, and there set up in different form its various claims or items against the Government, and that the same is a proper amendment and should have been allowed by the claims board, Director of Purchase.

2. This Board is further of the opinion that the claimant can not be compelled, as a condition precedent to an offer of settlement or award, to secure from its subcontractors releases. The act of March 2, 1919, provides in paragraph 4—

“That whenever under the provisions of this act the Secretary of War shall make an award to any prime contractor with respect to any portion of his contract which he shall have sublet to any other person, firm, or corporation who has in good faith made expendi-

tures, incurred obligations, rendered service, or furnished material, equipment, or supplies to such prime contractor, with the knowledge and approval of any agent of the Secretary of War duly authorized thereunto, before payments of said award, the Secretary of War shall require such prime contractor to present satisfactory evidence of having paid said subcontractor or of the consent of said subcontractor to look for his compensation to said prime contractor only; and in the case of the failure of said prime contractor to present such evidence of such consent the Secretary of War shall pay directly to the said subcontractor the amount found to be due under said award; * * * .”

3. This section plainly states “before payment of said award,” and nowhere does it say that before the award or offer of settlement shall the claimant be compelled to settle with his subcontractors or to secure releases from them. As the amount due the claimant, if any, by the Government is to be arrived at by compromise, it would be unfair to compel the claimant, prior to any offer made it by the Government, to secure from its said subcontractors formal releases, for, until claimant has succeeded in arriving at a tentative settlement with the Government, it might not be in a position to intelligently compromise or negotiate with its subcontractors for settlement of any claim the said subcontractors may have against it

4. The claims board, Office of Director of Purchase, was correct in disallowing the \$500 item under item F of claimant’s petition, since the said sum was for expenses incident to the preparation of its claim for presentation to the Board of Contract Adjustment. Such expenditures are not such as can be allowed by this Board.

5. This Board having decided the only questions that were presented to it for decision, and the final settlement of the case being more of an accounting proposition than anything else, the same must be returned to the Purchase Section, War Department Claims Board, for final settlement.

DISPOSITION.

This section hereby transmits its decision to the Purchase Section, War Department Claims Board, for action in accordance herewith.

Lieut. Col. McKeeby and Capt. Woodfin concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

DECEMBER 3, 1920.

Cases Nos. 1908, 1486, and 2165.

In re **CLAIM OF UNEXCELLED MANUFACTURING CO. (INC.).**

ON APPEAL BEFORE THE SECRETARY OF WAR.

Under date of June 30, 1920, the Board of Contract Adjustment rendered decision denying relief. (See Vol. VI, p. 682.)

Upon consideration of the appeal in the above-entitled case I direct action in accordance with the accompanying memorandum of the vice chairman, War Department Claims Board.

NEWTON D. BAKER,
Secretary of War.

MEMORANDUM FOR THE SECRETARY OF WAR.

1. The above claims were originally filed with the New York district ordnance salvage board in the early part of 1919. The claims were for raw material, material in process, etc., in excess of the quantity necessary to fill orders which the contractor actually received, and also for some machinery. The claims were filed on the theory of an informal agreement for an unlimited quantity of signal rockets, etc. The New York board made an award by the terms of which the United States was to take over certain material owned by claimant, including 710 pounds of aluminum powder at 80 cents per pound or \$568. The award of the district board was forwarded to the Ordnance Claims Board, and pending action by that board on the award, the New York board, on July 23, 1919, instructed claimant to ship the 710 pounds of aluminum powder to Pain's Fireworks. This the claimant accordingly did on July 28, 1919; the material being sent in trucks furnished by Pain's Fireworks, and being receipted for by that company. The Ordnance Claims Board disapproved the award of the New York board, and claimant appealed to the Board of Contract Adjustment. The Board of Contract Adjustment held that there was no informal agreement between claimant and the United States within the purview of the act of March 2, 1919, and, therefore, disallowed the claims. It does not appear that the attention of the Board of Contract Adjustment was called to the fact that claimant had delivered 710 pounds of aluminum powder to Pain's Fireworks on the order of the New York board, and for

which the United States was obligated to pay the sum of \$568; hence no mention of this transaction was made in the decision of the Board of Contract Adjustment.

2. The present appeal to the Secretary of War is only on the item above-mentioned. Clearly claimant is entitled to payment for the material delivered at the order of the New York district ordnance salvage board, not on the theory of an informal agreement arising under the act of March 2, 1919, but on a quantum meruit basis. The proper procedure would be for the Contract Section of the Ordnance Department to issue a certificate of fair value to claimant for the 710 pounds of aluminum powder at 80 cents per pound for a total of \$568, and thus expedite payment of a just obligation which should have been discharged immediately upon delivery of the material on July 28, 1919.

3. It is, therefore, recommended that the Appeal Section be directed to modify their order denying all relief and the papers then transmitted to the Ordnance Department for action as above indicated.

J. A. HULL,
Vice Chairman, War Department Claims Board.

DECEMBER 13, 1920.

Cases Nos. 1908, 1486, and 2165.

In re **CLAIM OF UNEXCELLED MANUFACTURING CO. (INC.).**

1. **CLAIM AND DECISION.**—On June 30, 1920, the Board of Contract Adjustment rendered a decision in the above claims denying relief on a class B claim for material in excess of the quantity necessary to fill orders claimant actually received. That decision failed to mention that 710 pounds of aluminum powder had been delivered to Pain's Fireworks on July 28, 1919, on the order of the New York district ordnance salvage board, to be paid for by the Government at 80 cents per pound. Claimant appealed to the Secretary of War on this item alone. Held, claimant entitled to reimbursement on a quantum meruit and the decision of June 30 to be modified accordingly. (See Vol. VI, p. 682, and Vol. VIII, p. 267.)

Capt. Taylor writing the opinion of the Board.

[Supplemental decision.]

FINDINGS OF FACT.

The Appeal Section finds the following to be the facts:

1. The above claims were originally filed with the New York district ordnance salvage board in the early part of 1919. The claims were for raw material, material in process, etc., in excess of the quantity necessary to fill orders which the contractor actually received from the United States, and also for some machinery. The claims were filed on the theory of an informal agreement for an unlimited quantity of signal rockets, etc. The New York district ordnance salvage board made an award by the terms of which the United States was to take over certain material owned by claimant, including 710 pounds of aluminum powder at 80 cents per pound for a total of \$568. The award of the New York district board was forwarded to the Ordnance Claims Board for approval, and pending action by that Board on the award, the New York district ordnance salvage board on July 23, 1919, instructed the claimant to ship the 710 pounds of aluminum powder to Pain's Fireworks, Dongan Hills, N. J. This the claimant accordingly did on July 28, 1919; the material being sent in trucks furnished by Pain's Fireworks, and being receipted for by that company.

The Ordnance Claims Board disapproved the award of the New York district ordnance salvage board, and claimant appealed to the Board of Contract Adjustment. The Board of Contract Adjustment

in a decision, dated June 30, 1920, held that there was no informal agreement between claimant and the United States within the purview of the act of March 2, 1919, and, therefore, disallowed the claims. It does not appear that the attention of the Board of Contract Adjustment was called to the fact that claimant had delivered 710 pounds of aluminum powder to Pain's Fireworks on the order of the New York district ordnance salvage board, and for which the United States was obligated to pay the sum of \$568; hence no mention of this transaction was made in the decision of the Board of Contract Adjustment.

2. Claimant appealed to the Secretary of War from the decision of the Board of Contract Adjustment denying any relief on the above-mentioned claims. The appeal to the Secretary of War was not from the decision of the Board of Contract Adjustment holding that there was no informal agreement within the purview of the act of March 2, 1919, but was only from the action of the Board of Contract Adjustment failing to allow claimant reimbursement for the 710 pounds of aluminum powder. Under date of December 3, 1920, the Secretary of War ordered that the decision of the Board of Contract Adjustment, dated June 30, 1920, be modified in accordance with an accompanying memorandum of the vice chairman, War Department Claims Board, dated December 3, 1920.

The memorandum of the vice chairman, War Department Claims Board, above referred to, is to the effect that claimant is entitled to be reimbursed the value of the 710 pounds of aluminum powder, above referred to, not on the theory of an informal agreement under the act of March 2, 1919, but on a quantum meruit basis, and recommends that a certificate of fair value to be issued by the contract section of the Ordnance Department covering the 710 pounds of aluminum powder at 80 cents per pound for a total of \$568.

3. In accordance with the above-mentioned order of the Secretary of War and memorandum of the vice chairman, War Department Claims Board, the decision of the Board of Contract Adjustment rendered in the above-styled claims on June 30, 1920, is hereby modified as follows: It appears that on July 28, 1919, claimant delivered 710 pounds of aluminum powder to Pain's Fireworks, Dongan Hills, N. J., on order of the New York district ordnance salvage board, pursuant to an award made by said New York district ordnance salvage board, which fixed the price to be paid for said aluminum powder by the United States at 80 cents per pound. It further appears that claimant has not been paid for said aluminum powder, and that the Board of Contract Adjustment, in its decision of June 30, 1920, failed to make any mention of this fact.

Claimant is clearly entitled to be reimbursed for the value of the aluminum powder sold to the United States and delivered to Pain's

Fireworks on the order of the New York district ordnance salvage board. The United States is obligated to make payment for this material not on the theory of an implied agreement within the purview of the act of March 2, 1919, but on a quantum meruit basis.

DISPOSITION.

The Appeal Section, War Department Claims Board, will transmit a copy of this decision to the Ordnance Section, War Department Claims Board, for appropriate action in accordance with the order of the Secretary of War, dated December 3, 1920, and the accompanying memorandum of the vice chairman, War Department Claims Board.

Lieut. Col. McKeeby and Lieut. Hendon concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

DECEMBER 14, 1920.

Case No. 3016.

In re **CLAIM OF HART WOOL CO.**

INFORMAL CONTRACT.—Where claimant sells wool to the Government in 1918 under regulations issued by the War Industries Board for the clip of 1918, which regulations provide that the wool shall be taken over by the Government at certain prices, depending upon its quality and condition, there is no agreement, express or implied, whereby the Government is obligated to pay to the claimant any sums other than as set out in the said regulations.

Maj. Farr writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is a class B claim in the sum of \$503.98 and is filed under the provisions of Supply Circular No. 17, 1919, Purchase, Storage and Traffic Division, having been originally filed with the War Industries Board. At the time it was filed with the War Industries Board the amount of the claim was \$5,153.32, it having been since reduced to \$503.98, the negotiations of the claimant with the War Industries Board apparently having begun early in the year 1918 by letters directed to Mr. Ambrose Rose, jr., the Government wool administrator in Chicago, Ill.

2. In 1917 the claimant, a corporation engaged in the buying and selling of wool at Worthington, Minn., alleges that it purchased from Berman Bros., of Minneapolis, Minn., a certain quantity of wool, which was by claimant sent to E. Dorzelot of St. Louis, Mo., for the purpose of being scoured, and, while in the possession of the said E. Donzelot, a certain portion of it was sold, the said sale taking place prior to the issuance of any Government regulations controlling the sale or purchase of wool, and that the balance of the wool so purchased by the said claimant from the said Berman Bros. was taken over by the Government some time in 1918, and was by the Government placed in the 1918 wool, its contention being that under the wool regulations affecting the 1917 wool, and under instructions and promises received by it from Mr. Ambrose Rose, jr., wool administrator of the Chicago district, it was entitled to receive and was promised by the said Mr. Rose the cost of the wool so purchased

by it plus 5 per cent. The said claim is fully described and set out in Schedule A of claimant's petition as follows:

SCHEDULE A.

Items of cost of wool (debit):

October 17, 1917, bought 55 bags of wool from Berman Bros., of Minneapolis, Minn., 9,053 pounds, at 65 cents-----	\$5,884.45
Freight on above wool to St. Louis, Mo.-----	60.21
Storage charges by railroad company at St. Louis-----	2.70
Drayage to warehouse-----	4.59
Freight on wool, St. Louis to Chicago-----	35.52
Charges for assorting 5,259 pounds, at $\frac{1}{4}$ cents-----	54.44
Charges for scouring 7,013 pounds, at $2\frac{1}{4}$ -----	157.79
Drayage on wool from St. Louis warehouse to railroad-----	3.71
Interest at 6 per cent on \$3,544.32 to Mar. 24, 1919 (\$3,544.32 equals the cost of said wool, originally \$5,884.45, less \$1,340.13, the amount received from sale of part of said wool before the Government took it over).	
5 per cent on cost of said wool as shown by total of above items-----	325.45
	<hr/> 6,834.54

Proceeds of sale of wool (credits):

Wool sold by E. Donzelot & Son, Boston, prior to Government taking same-----	\$1,214.43
Wool sold by Government prior to filing claim-----	125.70
Wool sold by Government at sales by E. Donzelot & Son on March 24, 1919, account sales-----	4,990.43
	<hr/> 6,330.56
Amount claimed to be due Hart Wool Co. at date hereof-----	503.98
	<hr/> 6,834.54

The petition filed by the claimant is rather informal, and it alleges therein that the claim was first presented in 1918, but that it is unable to furnish a full and detailed statement of this claim, giving dates for all items and particulars.

3. The wool in question was forwarded by the claimant to E. Donzelot & Son, of St. Louis, Mo., for the purpose of being sorted and scoured, and was by that firm disposed of to the Government for the credit of claimant. The claim here presented is for the difference between what claimant alleges it paid for the wool and the price it secured from the Government, plus 5 per cent.

4. The chief contention of the claimant is that it was promised by Mr. Ambrose Rose that it would be paid the sum it had expended for the purchase of the wool plus 5 per cent, and offers in support of its claim the following telegram:

SEPTEMBER 19, 1918.

AMBROSE ROSE, Jr.,

Government Wool Administrator, Chicago, Ill.

In accepting offer made to Donzelot for scoured wool through Boynton Wool Scouring Co. Can we then file claim for cost plus 5 per cent for 1917 wool.

HART WOOL CO.

This telegram was replied to under date of September 19, 1918:

HART WOOL Co.,
Worthington, Minn.

If scoured valuations are below cost, simply state you want claim cost plus 5 and file claim.

AMBROSE ROSE, Jr.,
Wool Administrator.

Under date of September 20 claimant advised Mr. Ambrose Rose as follows:

We are in receipt of your wire, and we have wired the Boynton Wool Scouring Co. that we will file claim for cost of wool plus 5 per cent as per your instructions. You wrote to us some time ago that the proper papers will be forwarded to us to be filed. We do not know what way to proceed and we will thank you for the information. You can possibly instruct us, we appreciate it very much."

Under date of September 24 Mr. Rose replied to this letter:

"This office has no papers for making the claim of cost plus 5 per cent on 1917 wools. If you will address a letter to Chas. J. Nichols, wool administrator, 273 Sumner Street, Boston, Mass., requesting him to send you papers, that will enable you to file claim for cost plus 5 per cent on the 1917 wools that were scoured by the Boynton Wool Scouring Co., they will forward same to you."

Under date of October 9, 1918, Mr. Ambrose Rose notified claimant:

"The claim for cost plus 5 per cent will have to be made out on a regular form which you can get on application from Mr. Nichols.

"As these forms cover 1917 wools which come under separate regulations, this office has nothing to do with same. Otherwise I will be glad to accommodate you with copies of the regular form."

Under date of December 9, 1918, claimant was advised by Mr. Ambrose Rose, jr.:

"In checking up your claim of cost plus 5 per cent on the wools scoured by the Boynton Wool Scouring Co., I found that there was one small lot of 23 pounds of scoured Corral which had not been valued by the Government Valuation Committee. It is therefore necessary to forward this lot to Boston for appraisement, and as soon as this valuation is received a report will be made to you, and you will then have to make out a new proof of cost.

"When this is done we will probably be able to make an adjustment shortly."

Prior to the foregoing mentioned letters and telegrams, Mr. Ambrose Rose, jr., under date of August 1, 1918, advised the claimant:

"Your favor of the 24th received, and I have turned over the papers in regard to your wool to the Boynton Wool Scouring Co.

"The invoice which you sent me I am returning. When the wools are submitted to the scour wool committee at Boston for valuation

they will have to be submitted as 1917 wools with a notation that you intend to claim cost plus 5 per cent on the same, and they will then forward to you papers to be filled, in order to enable you to secure same."

Under date of December 12, 1918, Mr. Rose by letter advised claimant that the Government had valued its lot of 419 consisting of 23 pounds of scoured corral at 70 cents landed in Boston, and that he had advised the wool-purchasing quartermaster that claimant intended to claim cost plus 5 per cent on the shipment.

5. The correspondence in the file seems to indicate that the claimant had about 46 bags of grease wool that was shipped to the Boynton Wool Scouring Co., August 2, 1918, to be scoured and offered to the Government, and that the small lot of 23 pounds heretofore referred to was Corral sweepings that were not, through some error, washed at the time the 46 bags were scoured.

6. As the claimant alleges that Mr. Rose promised them the prices they had paid for their wool plus 5 per cent, Mr. Rose was communicated with and, under date of November 13, 1920, filed with this Board an affidavit, which is herewith set forth:

"I, Ambrose Rose, jr., former Government wool administrator, Chicago district, hereby certify the claim of the Hart Wool Co., of Worthington, Minn., for cost plus 5 per cent on their 1917 wools was received and checked by me as to quantity and grade only, and forwarded to Mr. Charles J. Nichols, wool administrator, 100 Sumner Street, Boston, Mass., on December 18, 1918.

"I hereby certify that I did not make any promises of payment of this claim other than if same was approved by the wool administrator at Boston, Mass., and found to be according to the Government regulations, that an adjustment would be made according to those regulations."

7. In 1917 the Government was not regulating the price of wool nor had it issued any instructions covering the same. It was not until the 25th of April, 1918, that the War Industries Board held a meeting of the various wool dealers and growers in the city of Washington, at which time it was voluntarily agreed that the Government should take over the 1918 clip at the prices prevailing on July 30, 1918. Thereupon there was issued by Mr. Lewis Penwell, chief of the wool division, War Industries Board, a Government regulation for the handling of the wool clip of 1918, wherein it was specifically stated what prices should be paid for wool and how the same should be taken over and handled by the Government. These regulations make no provision for the payment to any dealer of the price he had paid for his wool plus 5 per cent but did, in specific terms, state

definitely the prices that should be paid, and therein fixed the price to be paid for Minnesota wool as follows:

	Basis clean scoured.	
	Price— choice.	Average.
Fine delaine.....		\$1. 80
Fine clothing.....	\$1. 70	1. 65
Half-blood staple.....	1. 63	1. 60
Half-blood clothing.....	1. 60	1. 57
Three-eighths staple.....	1. 40	1. 37
Three-eighths clothing.....	1. 37	1. 34
Quarter-blood staple.....	1. 28	1. 26
Quarter-blood clothing.....	1. 26	1. 24
Low quarter-blood.....	1. 17	1. 15
Common and braid.....		1. 07

DECISION.

1. Before this Board can advise any payment to the claimant, an agreement, express or implied, must be conclusively established as existing between the claimant and the United States Government, whereby the Government agreed to pay to the claimant the cost of its wool plus 5 per cent commission. The claimant has failed to produce any evidence establishing any such agreement. Mr. Ambrose Rose, jr., with whom claimant alleges it made the agreement it now asks this Board to decide entitles it to compensation, has, by his affidavit heretofore quoted, specifically denied that he ever promised claimant that it would be reimbursed for the actual cost of its wool plus 5 per cent.

2. Mr. Rose was only entitled to take over the wool under the regulations of May 21, 1918, and could promise no one any sum other than those as specifically set forth in the said regulations. These regulations were universally distributed and claimant must have known the conditions under which it was dealing with the Government and that it was bound by the regulations as issued by the War Industries Board.

3. The various letters and telegrams that have been quoted simply go to show that Mr. Rose was willing to receive and file the claim, and that he never at any time promised to the claimant it would be paid its actual cost plus 5 per cent. In fact, the regulations specifically provide what payment should be made, and then only after an inspection of the same had been made by the Government committees which placed upon the said wool its value or shrinkage, on which was based the price that was to be paid it by the Government.

4. At the time the claimant forwarded its wool to be scoured and disposed of by the Boynton mills, no regulations of any kind existed and it was subsequent to the time that the wool had been forwarded

to the said Boynton mills that the wool regulations of May 21, 1918, were promulgated by the War Industries Board, and at the time the wool in question was disposed of to the Government, the only regulations then existing for the handling of the wool were the regulations of May 21, 1918, and it made no difference whether the wool in question was grown in 1917 or 1918 as the same was tendered to the Government during the time that the regulations of May 21, 1918, governed, and no agreement, express or implied thereby resulted whereby the Government is in any wise bound to pay to the claimant the cost of its wool plus 5 per cent. Such an agreement on the part of the Government to have paid a dealer the cost of its wool plus 5 per cent would have put a premium on inefficient business methods, and would have resulted in the Government reimbursing improvident purchasers of wool and at a price, perhaps, greatly in excess of its true value. The wool regulations were drafted to prevent this very thing and the amount of money the Government would pay for wool under the said regulations was dependent entirely upon the quality and condition of the wool, and this quality and condition was arrived at by an examination of the wool in question by the Government wool committee.

5. This Board in the decision of the claim of the Central Wool Growers Storage Co. No. 2621 has entered into a full discussion of the regulations of May 21, 1918, governing the taking over of the wool by the Government to which claim reference is now made for a more full discussion of the regulations herein referred to.

6. For the foregoing reasons all relief asked for by the claimant is denied.

DISPOSITION.

A final order denying relief will issue.

Lieut. Col. McKeeby and Capt. Sheppard concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

DECEMBER 15, 1920.

Case No. 3025.

In re CLAIM OF ALEX FERGUSON.

1. **BURDEN OF PROOF—VALUE OF WOOL.**—Where the Government Valuation Committee fixed a certain value on claimant's wool the valuation so fixed will be deemed the true value of such wool, for the purpose of adjusting claimant's contract, in the absence of evidence showing such value to have been erroneously fixed.
2. **CLAIM AND DECISION.**—This claim is for \$5,000, and arises under the act of March 2, 1919, by reason of an agreement alleged to have been entered into between the claimant and the Government. Held, claimant is not entitled to the relief sought.

Maj. Farr writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is a class B claim for approximately \$5,000 and seems to have been informally filed in 1918 by a protest made to Mr. Chas. J. Nichols, Wool Administrator, but no formal claim was ever presented to this Board until October, 1920.
2. The claim here presented is an informal one in that the facts seem to consist chiefly of a report from Eisemann Bros., of Boston, Mass., showing the disposal by them of claimant's wool, as follows:

Date of arrival as shown by freight bill, Aug. 12, 1918.

Tags.			
Black	34,539 pounds at 50 cents		\$17,269.50
	560	20	112.00
	194	50	97.00
			<hr/> 17,478.50

Advances and interest.

1918.		
July 20. Advance	12,000.00	
Interest to Aug. 12, 23 days, at 6 per cent	46.00	
July 27. Advance	4,208.56	
Interest to Aug. 12, 16 days, at 6 per cent	11.22	
Freight	674.23	
	<hr/> 16,940.01	
Balance		538.49
Interest credit Aug. 12 to Oct. 8, 58 days, at 6 per cent		5.20
Sacks, 85, @ 50 cents		42.50
		<hr/> 586.19
Total amount due you, as per draft herewith		

3. The file contains several letters written by the claimant to Eisemann Bros., and communications from Eisemann Bros. to the claimant in re the revaluation of the wool and, under date of October 31, 1918, Eisemann Bros., the wool dealer to whom claimant had consigned his wool, advised claimant in part as follows:

"When your wool was examined and appraised one of our representatives was with the valutors and if he had not thought that the valuation was a fair and just one, we would have asked for revaluation.

"As written you previously, the scoured wool basis on your wool was \$1.67, shrinkage 70 per cent. The wool was appraised in the original bags as the valutors decided that the grade was very uniform and it was not necessary to grade it."

4. The claimant was further advised that the wool in question was known to the Wool Administrator Mr. Chas. J. Nichols as DF-4354—84 bags and, under date of November 23, 1918, Eisemann Bros., after apparently having made an effort to have the matter reopened by the Wool Division, War Industries Board, advised claimant that the said Wool Division declined to reopen the case.

5. The facts in this case are apparently somewhat similar to those in the case of the Central Wool Growers Storage Co. of San Angelo, Tex., 2621, heretofore decided by this Board, payment being asked here on the theory that there was an erroneous valuation placed on the wool in question by the Government-valuation committee.

6. By an affidavit filed in this case, the widow of the claimant advises that this claim was never presented until October, 1920.

7. Claimant has submitted and offered no evidence showing the value of the wool and, under date of October 27, 1920, Joseph Garst advised this Board that Mrs. Ferguson had made the statement that, in her opinion, the amount due her should have been something over \$5,000 instead of \$586.19, but she has offered no evidence, documentary or otherwise, tending to show what her losses were, if any, contenting herself with the naked allegation that the Government valuation committee made a mistake in grading her wool thereby causing her to suffer a loss of approximately \$5,000.

DECISION.

1. Since this case will be decided on its merits, we do not deem it necessary to seriously consider whether or not this claim was filed before June 30, 1919, as provided for in the act of March 2, 1919, but believe that we should consider that the filing of a protest with the Wool Administrator objecting to the amount allowed on account of the wool of claimant, should, by this Board, be accepted as a presentation of the claim within the time limit provided in the said act.

2. This Board is of the opinion that the claimant has failed to produce any evidence that would justify this Board in reaching a conclusion that the valuation placed upon his wool by the said Government valuation committee, the said price being thereafter paid to and accepted by the claimant, was erroneous and believes that the shrinkage placed on the said wool by the said valuation committee was proper and correct, and that the sum so paid to the claimant in accordance with the said report of the Government valuation committee was correct and that the claimant is therefore entitled to no relief at the hands of this Board.

3. All relief asked for by the claimant is denied.

4. For a full discussion of the facts and the opinion of this Board in support of this decision see the Central Wool Growers Storage Co., San Angelo, Tex., claim No. 2621.

DISPOSITION.

A final order denying relief will be entered.

Lieut. Col. McKeeby and Capt. Sheppard concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

DECEMBER 17, 1920.

Case No. 3039.

In re **CLAIM OF J. RICHMAN & CO.**

- 1. CLAIM AND DECISION.**—This is a claim under General Order 103 to adjust a dispute under the terms of the contract with the Surplus Property Division. Claimant was awarded 37,811 yards of duck khaki, 30-inch, at a total price of \$15,270.43, as a result of an advertisement and its proposal. Claimant paid the required deposit of 10 per cent on \$1,527.04. Claimant received a sample of the goods and on inquiry was informed that one edge was raw selvage, a fact not mentioned in the advertisement or letter accepting its bid. Claimant then ordered 1,000 yards, paying the full price. Claimant was advised that an allowance of 10 per cent would be made if satisfactory to it. Claimant requested the return of its deposit and 10 per cent rebate on the 1,000 yards taken. Following the decision of the Secretary of War on appeal in the Aeronautical Equipment Co. (Inc.), Sale B. C. A. 17, it is held that claimant is entitled to a cancellation of the contract as to the balance of the yardage and return of its 10 per cent deposit.

Maj. Hill writing the opinion of the Board.

This is a claim arising under General Order 103 for adjustment of a dispute under the terms of a contract between claimant and the Surplus Property Division, Office of the Quartermaster General, by the terms of which the Government sold 37,811 yards of duck khaki, 30-inch, 12.85-ounce, 44 by 26, at a total price of \$15,270.43. The claim was received by this section from the Surplus Property Division.

FINDINGS OF FACT.

1. Under date of April 30, 1920, the Surplus Property Division by its form No. S. P. 13, letter of acceptance of bid of surplus property, signed by the contracting officer, Surplus Property Division, sale No. 20408, accepted claimant's proposal based upon textile list No. 23, item 2338, for 37,811 yards of duck khaki, 30-inch, 12.85-ounce, 44 by 26, manufacturer unknown, and on the same date the depot officer, Chicago, was authorized to make delivery upon payment for the same.

2. The following was one of the conditions contained in the letter of acceptance:

“1. *Deposit.*—Deposit of 10 per cent of the amount of this purchase must be delivered to the designated depot officer before this

letter of acceptance is effective or valid, and this amount is deposited by the purchaser with the understanding that the same is given as a guarantee of fulfillment of agreement to accept these goods within the time, at the place, and in the manner herein specified."

Claimant forwarded to the depot officer, Chicago, his check for \$1,527.04, the 10 per cent deposit required.

3. Under date May 26, 1920, claimant advised the depot officer, Chicago, that the sample received was raw edged and requested information as to whether this was a sample from the lot purchased by them. Under date June 7, 1920, claimant was advised by the depot officer, Chicago, that the material sold to claimant had one edge finished and the other raw. In the advertisement of this sale no mention was made of raw selvage. Under date of June 12, claimant was informed by the Surplus Property Division that the customary allowance for one edge raw selvage was 10 per cent and was requested to advise whether such an allowance would be satisfactory. Claimant replied that the allowance of 10 per cent would not be satisfactory and claimed an allowance of 25 per cent. Under date of August 2, claimant was advised that the local board of sales control, Washington, on July 30, recommended that its claim for allowance of 25 per cent be disallowed. Under date August 7, claimant forwarded its check for \$405.90 to the depot officer, Chicago, requesting that 1,000 yards be forwarded for inspection which would enable them to take up the matter further as to a final adjustment. This quantity was forwarded to claimant. On October 27, the local board of sales control, Washington, authorized the cancellation of sale No. 2408 and the making of a new sale at 10 per cent less than the original price.

4. Claimant declined to accept this allowance of 10 per cent and appealed to this section for the return of its deposit of \$1,527.04 plus a refund of 10 per cent on the 1,000 yards delivered, amounting to \$40.59.

DECISION.

1. It is clear that the material on hand and sold to claimant was a different article and of less value than the material listed as item No. 2338 on textile list No. 23 in that one edge was a raw and not a finished selvage.

2. No regulations covering the form of contracts for the sale of surplus property have been prescribed by the Quartermaster General pursuant to section 6853b, Compiled Statutes. This contract is therefore not a contract within the exceptions to section 2744, Revised Statutes, but is an informal contract. As the letter of acceptance is dated after November 11, 1918—April 30, 1920—the contract is not one coming within the terms of the act of March 2, 1919.

3. Claimant paid for and ordered the delivery of 1,000 yards after it had in its possession a sample of the goods and had been advised that they were not as advertised, but did have one edge raw selvage. Under these circumstances, it is the opinion of this section that the claimant has waived, as to this quantity of 1,000 yards, the failure of the goods to comply with the advertisement and letter of acceptance, and has therefore purchased a known quality of duck at the price paid and is therefore not entitled to an adjustment thereon.

4. As to the balance of the yardage sold under the letter of acceptance, this section is bound by the decision on appeal by Secretary of War in the case of the Aeronautical Equipment Co. (Inc.), Case No. Sales B. C. A. 17. In that case the Board of Contract Adjustment held that the power of the Secretary of War to settle contracts not coming within the provisions of the act of March 2, 1919, by agreement with the contractor or to adjust disputes arising thereunder, rested wholly upon the existence of the contract and could not be exercised where the contract had been fully executed by the performance or terminated by breach, cancellation, or otherwise; and that upon a breach of the contract the adjustment of money payments thereunder was not the function of the Secretary of War but pertained to the powers of the Treasury Department or of the courts. Upon appeal the Secretary of War did not concur in the views of the Board of Contract Adjustment as to his powers and directed that the decision be vacated, that the case be transmitted to the board from which it originated, to state an account, and that the entire file with such statement be then transmitted to the Chief of Finance for appropriate action.

5. It is, therefore, the opinion of this section that claimant is entitled to cancellation of this contract as to the balance remaining undelivered and to the return to it of the 10 per cent deposit. It is recommended that upon such cancellation and return of deposit claimant be required to release the United States from further liability under this contract.

DISPOSITION.

The Appeal Section transmits its decision to the Surplus Property Division, office of the Quartermaster General, for action in accordance with the decision.

Lieut. Col. McKeeby and Lieut. Tabb concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

DECEMBER 17, 1920.

Case No. 3028.

In re **CLAIM OF VAN DORN IRON WORKS CO.**

- 1 DISTRIBUTION OF OVERHEAD COST BETWEEN CONTRACTOR'S COMMERCIAL WORK AND GOVERNMENT WORK.**—Pro rating overhead cost between the contractor's commercial work and Government work on the labor-hour basis places an excess burden of overhead cost on the commercial work which is unfair to the contractor when production on Government work has been greatly delayed by the failure of the Government to furnish drawings, parts, etc., on time. The proper basis of pro rating the overhead for the period of delay is the basis that obtained when the contractor finally got into production on Government work.
- 2. ADMINISTRATIVE EXPENSE ON COST OF INCREASED FACILITIES SPECIALLY PROVIDED FOR.**—A contractor is entitled to a reasonable allowance for factory management, or general administrative expense for services rendered in the construction of increased facilities specially provided for, in addition to the overhead expense applicable thereto. Such allowance is provided for in "Definition of 'Costs' Pertaining to Contracts."
- 3. INTEREST ON MONEY BORROWED TO PURCHASE DIRECT AND INDIRECT MATERIAL APPLICABLE TO THE GOVERNMENT CONTRACT.**—In the absence of conclusive proof that borrowed money was used to purchase material applicable to the Government contract a claim for interest on such borrowed money will be disallowed.
- 4. TEN PER CENT PROFIT ON DIRECT MATERIAL FURNISHED BY SUBCONTRACTORS.**—In accordance with the provisions of Supply Circular No. 111 and No. 126, 1918, no profit can be allowed on direct material furnished by subcontractors.
- 5. CLAIM AND DECISION.**—Appeal from the Ordnance Section disallowing the above items of a claim on two contracts, one a formal contract, the other an informal war order. Held, items disposed of as above stated.

Capt. Taylor writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim is before the Appeal Section on appeal from the Ordnance Section. The claim as originally filed was for \$715,700.38, based on two contracts, viz, (1) contract CME-450, which was a formal contract, dated December 17, 1917, which was subsequently amended by five supplemental contracts, some of which were proxy signed, and (2) War Order No. P11726-2008-ME, dated July 11, 1918, covering which a formal contract was prepared and sent to the

contractor just prior to the armistice, but which was not signed by the contractor. Certificate form C and a formal contract validating this war order were issued by the Ordnance Department in 1919. The Ordnance Section has been unable to arrive at a settlement with the contractor on either of these contracts.

2. By the terms of contract CME-450, which may be more conveniently referred to as the "Tractor contract," the contractor was to furnish to the United States 650 6-ton tractors, model 1917-A, and sets of spares as specified by the contracting officer, at cost plus a fixed profit of \$325 on each tractor, and cost plus a fixed profit of \$97.50 on each set of spares. Delivery was to begin on April 1, 1918, and to be completed by November 30, 1918; delivery after May 1, 1918, to be at the rate of not less than 150 per month. Approved drawings were to be supplied by December 31, 1917, and if not supplied by that date the delivery date of the tractors was to be adjusted to take into account the delay in supplying the drawings. This contract provided for allowance of "Costs" in specific terms, which are substantially as set forth in "Definitions of 'Costs' Pertaining to Contracts." There was also the usual termination clause. However, no provision was made for any loss or damage sustained by the contractor by reason of the delay of the United States in furnishing the drawings on time.

This contract was amended by first supplemental proxy-signed contract, dated May 7, 1918, which increased the number of tractors by 600 to be delivered during December, 1918, and January, February, and March, 1919, at the rate of 150 per month. The price was the same as in the original contract.

The second supplemental contract has no bearing on this claim.

The third supplemental contract, dated September 19, 1918, provided for increased facilities not to exceed \$10,000 to be paid for by the United States at actual cost as defined by "Definition of 'Cost' Pertaining to Contracts," which was made a part of the contract by reference. These facilities were to remain the property of the United States, and were to be removed upon completion or termination of the contract.

The fourth supplemental contract, dated October 25, 1918, provided for increased facilities at an estimated cost of \$172,500,000 to be paid for by the United States on the same terms as stipulated in the third supplemental contract, but also provided that upon completion or termination of the contract the contractor shall purchase the facilities therein provided for at the appraised value thereof as determined by two appraisers, one to be selected by the contractor and one by the contracting officer.

The fifth supplemental contract, dated February 4, 1919, made provision for additional increased facilities at an estimated total

cost of \$97,400, which it had been found necessary to provide, the cost thereof to be paid by the United States, and to be taken over by the contractor on the terms provided in the fourth supplemental contract.

3. After the work on the tractor contract had begun the Ordnance Department decided to place a contract with this contractor for turrets for the tractors, and on July 11, 1918, the contractor was given War Order P11726-2008 ME for—

- (a) 5,106 turrets, complete, for 6-ton tractors.
- (b) 2,127 37-mm. gun mounts and equipment.
- (c) 2,979 machine-gun mounts and equipment.

delivery to begin in September, 1918, and to be completed by April 30, 1919. The contractor was to be paid the actual cost in accordance with "Definition of 'Costs' Pertaining to Contracts" plus a profit of 10 per cent on the first 500 turrets and equipment, after which a fixed price was to be established.

4. By the terms of the tractor contract the contractor was required to give the work thereunder precedence over all of its commercial work. In anticipation of the drawings, parts, etc., being furnished on time the contractor concentrated its commercial business within approximately 10 per cent of its factory space, reserving about 90 per cent for the work on Government contracts, and declining to take on any additional commercial business.

The Ordnance Department did not furnish the drawings, parts, etc., by December 31, 1917. In fact they were not furnished until September, 1918, and even after that date about 150 changes were made. Parts for only 10 tractors had been furnished by September 1, 1918, whereas parts for 750 should have been furnished by that date. The delay was not due to any fault on the part of the contractor, but was due solely to the fault of the United States. This is admitted by all of the representatives of the Ordnance Department who had anything to do with the contract while work was being done thereon. The Cleveland district claims board has also conceded that the contractor was not in any way at fault, but was at all time willing, ready and able to carry out both the first and second contracts.

5. After the armistice both of the contracts were suspended at the request of the Ordnance Department, but later the suspensions were modified to permit the contractor to complete a part of each contract. Apparently work was not finally suspended on the contracts until the latter part of March, 1919.

The contractor filed an itemized statement of claim on each contract, which, as amended, is as follows:

Claim on contract CME-450.

	Claim.	Cleveland ordnance district claims board.	Award of Ordnance Section, War De- partment Claims Board.
*a. Factory overhead.....	\$69,376.78		
*b. Loss account of delay of drawings and materials.....	476,900.00		
*c. Additional administration expense.....	73,619.99	\$51,783.47	\$51,783.47
*d. Miscellaneous.....	14,310.68	3,225.09	3,225.09
e. Labor claims.....	150,000.00	In abeyance	In abey- ance.
f. Expense after cancellation.....	29,080.83	34,217.78	34,217.78
g. Profit on storage, packing, and shipping expense	2,951.42	2,951.42	2,951.42
	707,239.70	92,177.76	92,177.76
Deductions:			
1. Credit voucher by Cost Accounting Section.....	10,918.90	10,918.90	10,918.90
2. Amount due United States being fair value of property transferred to the contractor in this claim.....	1,600.00	1,600.00	1,600.00
3. Increased facilities.....	90,315.00	157,714.00	90,315.00
	102,833.90	170,232.90	102,832.90
Net amount due the United States.....			10,656.14

Claim on War Order No. P11726-2008ME.

	Claim.	Award of Cleveland ordnance district claims board.	Award of Ordnance Section, War De- partment Claims Board.
*a. Loss on factory overhead.....	\$4,358.76	\$1,128.89	\$1,128.89
b. Additional administration expense.....	10,261.25	6,132.00	6,132.00
c. Profit.....	1,913.35	1,913.35	1,913.35
*d. Loss account nondelivery of drawings and material.....	72,000.00		
e. Miscellaneous expense.....	74.16	74.16	74.16
f. Labor claims (estimated).....	24,000.00	In abeyance	In abey- ance.
g. Expense after 6/30/19.....	687.06	780.20	780.20
	113,294.58	10,028.60	10,028.60
Deductions:			
1. Credit voucher from Cost Accounting Section.....		1,059.89	1,059.89
		8,968.71	8,968.71

The Cleveland district claims board undertook to negotiate a settlement of both contracts, and certain items of the claim were disallowed by that board, and the contractor has abandoned its claim as to these items. One item under the tractor contract is for \$476,900 and is designated "Loss on account of delay of drawings and material." A similar item on the turret contract is for \$72,000. These items represent the profits the contractor would have made if the cantracts had been carried to completion. The Cleveland district claims board very properly disallowed these two items, and the contractor has abandoned the claim therefor.

The action of the Cleveland district claims board in disallowing the other items of the claim was appealed from to the Ordnance

Section. A special master was appointed to report on the claim, and a hearing was held by him. The testimony presented before the special master was voluminous. The report of the special master was rejected by the Ordnance Section, and the claim was referred to the appeal committee. The action of the appeal committee was adverse to claimant except as to one item hereinafter mentioned, and the contractor appealed to the Appeal Section.

6. Two appraisers were appointed to appraise the special facilities. They made an appraisal of \$157,714, based on "the reproduction value, less depreciation." The contractor objected to this basis of appraisal, and the appraisers were ordered to make another appraisal based on the "fair value of the facilities to the contractor." This time the appraisers fixed the price of the facilities to be paid by the contractor at \$90,315. The Cleveland district claims board refused to abide by this appraisal and adopted the first appraisal in its final award. The appeal committee of the Ordnance Section very properly adopted the second appraisal, and from this action there is no appeal to the Appeal Section.

7. The items of the claim disallowed by the appeal committee will be taken up in the order in which they are set out in the appeal, viz:

A. Factory overhead:

	Claim.	Award.
Contract CME-450.....	\$69,376.88	.....
War Order P-11726-2008 ME.....	4,358.76	\$1,128.89

When the contractor began work on the first contract an agreement was entered into between the contractor and the Government accountant in charge that the factory overhead should be distributed between the contractor's Government business and its commercial business on a "labor hour" basis, i. e., overhead was to be divided between the Government work and commercial work on the basis of the number of hours of direct labor devoted to each. It is admitted that this is the proper basis, and would have worked out satisfactorily to the contractor if the United States had supplied the drawings, parts, etc., on time, but the record shows that when delays began to occur the contractor objected that the labor hour basis of prorating factory overhead was not fair to it. Very little direct labor was engaged on Government work, yet the contractor was taking on no new commercial work. Superintendents, foremen, etc., had to be kept on the pay rolls in order to maintain an efficient organization to be ready to get into production when the Government did furnish the necessary drawings, etc. The result, the contractor insists, was that its commercial business was charged with an

excess overhead. The contractor insists that if the Government had not been at fault it would have gotten into full production by April, 1918, whereas owing to the many delays it was not possible to get into production until November, 1918. The contractor therefore insists that November should be taken as the month which most fairly represents the true distribution of factory overhead between Government and commercial work, which should have existed from April 1. The contractor admits that it was not possible to get into full production during February and March, hence it is willing to share two-thirds of the excess overhead for February and one-half for March, and insists that for the months of April, May, June, July, August, September, and October the factory overhead should be distributed on the basis of the rate that did obtain for the month of November.

The cost accountants, while admitting that there is some merit in the contractor's contentions, insist that there was no marked increase in factory overhead on commercial work during 1918 from what was found by an audit to have obtained in 1917 and 1919; also that there was no marked depreciation in direct labor hours on the contractor's commercial business during 1918 from what obtained in its commercial business during 1917. It was also pointed out by the cost accountants that in spite of the excess burden placed on the contractor's commercial business by the "labor hour" basis of distributing the overhead, the contractor still made a substantial profit on his business for the year 1918.

As heretofore stated, the tractor contract made no provision for reimbursing the contractor for loss or damage sustained by the delay in delivery of drawings, etc. This fact seems to have influenced the district claims board in disallowing this item. However, the turret contract, which may be designated as the "validating" contract, which was prepared and executed long after the armistice, contained this provision—

"Article VI, paragraph (a) * * * The United States shall reimburse the contractor for any loss, damage, or additional expense sustained or incurred by the contractor as a direct and necessary result of the failure of the United States so to furnish such component parts and materials."

A special representative was appointed by the Cleveland district claims board to report on these claims. He admitted that there was some merit in the contractor's contention with reference to this item of the claims, but disallowed it as to the tractor contract because the contract made no provision for such an item of loss; the turret contract did contain such provision. The special representative decided that on the turret contract the fair basis of distribution of overhead could be arrived at by comparing the contractor's overhead for the last four months in 1917 with the overhead for 1918. This compari-

son showed that the overhead for the last four months in 1917 was slightly in excess of the overhead for 1918, and the special representative therefore allowed the contractor \$1,128.89 on this item of the claim on the turret contract. This report was adopted by the Cleveland district claims board, but the contractor insisted on the full amount of this item on both contracts and appealed to the Ordnance Section. The special master allowed the full amount of the item claimed under each claim. The appeal committee approved the award of the Cleveland district claims board.

8. *Item B.*—Additional general administrative expense on the cost of increased facilities, \$11,269.90. Claimant did not construct the special facilities provided for in the fourth and fifth supplementals to the tractor contract, amounting to approximately \$275,000, but sublet the work, and has been paid the actual cost thereof. The claim for administrative expense on the special facilities was for \$73,619.99. The accountants allowed \$51,783.47 of this item. One item of the sum disallowed is for \$11,269.90, and is for services rendered by claimant. The services alleged by claimant to have been rendered were: (1) Purchase of additional land, (2) getting material for the buildings, (3) supervision of their erection, (4) keeping of all costs, vouchers, estimates, and expenses. While the actual cost of the bookkeepers and others was paid by the Government, and is included in the amount allowed, the cost accountants, when estimating the general administrative expense applicable to the tractor contract deducted \$275,000 before making their estimate, hence the general administrative expense was not spread over the cost of the increased facilities. Claimant insists that it is entitled to this item as an item of general administrative expense or as representing the reasonable value of the services rendered by the contractor.

“Definition of ‘Costs’ Pertaining to Contracts” provides as follows:

“Par. 22. Labor performed by the contractor in connection with the setting, erection, or construction of such equipment (special facilities) shall be subject only to the overhead expense that applies to the department of the contractor’s plant that furnished the labor, such as direct supervision thereof, time keeping, and expenses incidental thereto, and a *reasonable allowance* for factory management, general plant expense or administrative expense.”

The action of the Cleveland district claims board in disallowing this item was appealed from. The special master recommended its disallowance. The Ordnance Section made no mention of this item in its report. However, the contractor has noted this item in its appeal to the Appeal Section.

9. *Item C.*—Additional interest on money borrowed and invested in direct and indirect material, \$11,085.59. This is a part of item (d)

miscellaneous, under the tractor contract claim. The total item was \$14,310.68, of which sum \$3,225.09 was allowed. The appeal is for the amount disallowed.

Claimant alleges that at the time the tractor contract was negotiated its finances were in such condition that it was unnecessary for claimant to borrow money to be used in its commercial business, but that it was obliged to borrow large sums of money to be used in purchasing direct and indirect material applicable to the Government contracts. The total amount of interest paid by claimant during the period these contracts were in operation amounted to \$20,794.61. Of this amount the cost accountants have allowed and vouchered, and claimant has been paid, the sum of \$9,709.02. The cost accountants stated that they were willing to allow any additional items of interest which the contractor could show was for money borrowed and invested in material applicable to Government contracts. Claimant has confessed its inability to show conclusively that the amount of interest represented by this claim was in fact for money invested in material applicable to the Government contracts. Claimant kept no separate bank account, nor was any record made of checks drawn on borrowed funds to meet invoices for material applicable to Government contracts. Claimant insists that we should assume, or take for granted, that all of the money borrowed on which this interest was paid was invested in material applicable to Government contracts.

10. *Item D.*—Ten per cent of the amount of material delivered by subcontractors and received by claimant.—The amount of this item is not set out in the appeal, but is about \$80,000.

Claimant insists that it is entitled to 10 per cent on all finished parts which were actually furnished by the numerous subcontractors. This is on the theory that, as the contracts were not completed and claimant was thus deprived of the profits which would have been realized, it is now entitled to a profit of 10 per cent on all finished parts supplied by subcontractors.

This item of the claim was disallowed by the Cleveland district claims board, from which action claimant appealed to the Ordnance Section, and has noted an appeal on this item to the Appeal Section.

DECISION.

1. *Item A.*—Loss on factory overhead: Contract CME-450, \$69,376.88; war order No. P11726-2008 ME, \$4,358.76. In our opinion it is not fair and just to examine into claimant's overhead costs for any period in 1917 or 1919, or any other year, in order to determine what pro rata of the overhead his commercial business would have carried during the idle months of 1918 if there had been work at full production on the Government contracts during this time. The best

standard to judge by is the overhead rate during November, 1918, which is the time when the contractor was in fullest production on the Government contracts. It is only reasonable to assume that the same rate of overhead would have been maintained during the eight months preceding November if there had been no delay by the Government. The cost sheet for 1918 shows that for February the overhead cost was \$20,878.71, and the total labor cost for the same month was \$27,506.57. The overhead rate for this month was therefore 75.9 per cent. For September the overhead cost was \$23,858.69 and the total labor cost was \$34,966.04, the overhead rate being 68.2 per cent. For November the overhead cost was \$28,505.95 and total labor was \$66,042.20, the overhead rate for November being 43.2 per cent. There is no dispute as to these figures. They show conclusively (1) that claimant had an overhead capacity far in excess of its commercial work requirements for the period during which the Government was behind in deliveries; (2) that this overhead capacity was kept in readiness for Government work; (3) that in pro rating the commercial work and the Government work on the "labor hour" basis claimant's commercial work has been charged with an excess overhead; (4) that the excess overhead pro rated to claimant's commercial work was due to the delay of the Government in furnishing the drawings, units, etc.

Clearly if claimant has suffered a loss on its contracts by reason of the delay of the Government in furnishing drawings, parts, etc., within the time specified in the contracts, there is an obligation on the part of the Government to reimburse the contractor for such loss.

The Appeal Section holds that the full amount of this item under each contract should be allowed.

2. *Item B.*—General administrative overhead on the cost of increased facilities, \$11,269.90. "Definition of 'Costs' Pertaining to Contracts" was made a part of the fourth and fifth supplementals to the tractor contract by specific reference. It makes provision for a reasonable allowance for factory management, general plant expense or administrative expense, on special facilities provided by the Government to be used in the performance of the main contract. No such reasonable allowance has been made to this contractor. The item of the claim is for 5 per cent of the cost of the increased facilities. In the opinion of the Appeal Section the contractor is entitled to a reasonable allowance for the services performed by it in providing the special facilities, and it is believed by the Appeal Section that the basis upon which the amount of this item has been arrived at by claimant is fair and reasonable. The item is therefore allowed.

3. *Item C.*—Additional interest, \$11,085.59. The cost accountants have offered to allow any part of this item that claimant can show

was for money borrowed and invested in material to be used in Government contracts. Claimant confesses its inability to furnish proof as requested by the cost accountants. Clearly the contractor is entitled to be reimbursed the interest it has paid for money borrowed and invested in material to be used on Government contracts, but on the other hand the contractor must furnish convincing proof of this fact. It is not the fault of the Government that the contractor is unable to furnish this proof. There is no one to blame but the contractor. A separate bank account could have been kept. On the proof as submitted we are unwilling to assume that all of this interest was for money invested in material to be used on Government contracts, and the action of the Cleveland district claims board in disallowing this claim is therefore approved.

4. *Item D.*—Ten per cent on the amount of material delivered by subcontractors. The action of the Cleveland district claims board in disallowing this term is sustained in accordance with the well-established policy of the War Department as set out in Supply Circulars No. 111, 1918, and No. 126, 1918.

DISPOSITION.

The Appeal Section will transmit a copy of this decision to the Ordnance Section for appropriate action.

Lieut. Col. McKeeby and Lieut. Hendon concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

DECEMBER 18, 1920.

Case No. 2664.

In re **CLAIM OF GEORGE A. CARDEN AND ANDERSON T. HERD.**

1. **AGENCIES OUTSIDE OF THE WAR DEPARTMENT.**—Where the representatives of the President purchase certain steamships for the United States which are turned over to the United States Shipping Board for operation, and the Shipping Board at some time during its possession turns over four of the ships to the War Department on "Time form charters," such transaction does not constitute a purchase by the President of the ships for War Department purposes within the meaning of the act of March 2, 1919.
2. **JURISDICTION.**—The Appeal Section, War Department Claims Board, as the agency of the Secretary of War, is without jurisdiction to entertain a claim growing out of the purchase of any property made by the President of the United States, or by his duly authorized and constituted agents, unless it shall be made to appear that such purchase was made for War Department purposes.
3. **CLAIM AND DECISION.**—Claim for \$7,500,000, growing out of the sale of seven steamships to the United States, such sale having been negotiated and consummated by the duly authorized and constituted agents of the President of the United States, it not conclusively appearing that the purchase of these vessels was for War Department purposes. Held, relief will be denied.

Maj. Blackburn writing the opinion of the Board.

FINDINGS OF FACT.

The Appeal Section finds the following to be the facts:

1. This claim arises under the act of March 2, 1919. Statement of claim, Form B, has been filed (May 12, 1920,) under Purchase, Storage and Traffic Division Circular No. 17, 1919, by reason of an agreement alleged to have been entered into between the claimants and Bernard M. Baruch, acting as agent for the President.

2. The claim was originally for percentage of gross earnings on freight by ships sold to the Government by claimants, but was later amended to cover the difference in the price paid by the Government to claimants and the then market value of the ships, amounting to \$7,500,000.

3. Hearings were held in this case on different dates, and voluminous testimony taken, and the testimony of Mr. William Denman, former chairman of the Shipping Board, was taken before the judge advocate, Ninth Corps Area, at San Francisco, Calif., both the Government and claimant being represented by counsel at the taking of Mr. Denman's testimony.

4. While the claim as presented involves a very large sum of money, and has been vigorously contested on both sides, the claimant being represented by some of the best legal talent in the United States, we do not deem it necessary to go into the merits of this case, as it must be decided upon the question of jurisdiction. A very brief statement of facts will, we think, be all that is necessary under the circumstances.

5. Prior to the entrance of the United States into the war with Germany the claimants, Messrs. George A. Carden and Alexander T. Herd, of New York City, conceived the idea of purchasing seven Austrian steamships, which were then interned in different ports of the United States.

6. On or about April 5, 1917, the claimants entered into an agreement with the agents of the Austrian owners for the purchase of these ships. Shortly after the entrance into the contract between Messrs. Carden and Herd and the agents of the Austrian owners, the United States Government, through Mr. William Denman, chairman of the United States Shipping Board, entered into negotiations with Messrs. Carden and Herd for the operation of these ships. The negotiations, however, failed, and on or about April 23, 1917, President Wilson authorized Mr. Bernard M. Baruch, a member of the Council of National Defense, to enter into negotiations looking to the purchase of these ships from Messrs. Carden and Herd.

7. Mr. Baruch entered into negotiations with these gentlemen, and on or about May 3, 1917, claimants sold to the United States Government the seven Austrian ships, and on said May 3, 1917, claimants, Mr. William Denman and the agents of the Austrian owners, entered into a written agreement entitled "Memorandum of Closing." On the same date the claimants executed bills of sale to the seven steamships and also executed to the United States of America a receipt covering the purchase of the vessels.

8. The vessels were turned over to the United States Shipping Board, and were placed in a state of repair by said Shipping Board, and thereafter put in commission and placed in operation.

9. The records of the Shipping Board disclose that the ships were allocated for operation at different times to different parties. Four of the seven ships at some time during the period of the war were allocated on time-form charter to the War Department.

10. Two of the ships were sunk by the submarines, and the other five ships were afterwards advertised for sale by the United States Shipping Board, and were sold to different parties by said United States Shipping Board, and the money received therefor was paid to the said United States Shipping Board.

11. The testimony discloses that the first record of any claim having been made to any department, officer, or agent of the Government by claimants for either the 5 per cent commission on gross freight earnings by the seven vessels or for the difference in the price paid by the United States Government and the market value of the ships at the time of their purchase, was presented to the Shipping Board on July 30, 1919, by Mr. George A. Carden, one of the claimants herein (Tr. July 15-16, 1920, pp. 17 et seq.)

DECISION.

1. Mr. George A. Carden, one of the claimants, testified that he presented this claim prior to June 30, 1919, but produces no witnesses nor record other than his unsupported testimony to this effect. While this Board has been most liberal in its construction of presentation of a claim, we do not know of any decision where they have gone to the extent of entertaining a claim upon the unsupported statement of claimant that he at some time prior to June 30, 1919, presented his claim to some officer or agent of the United States unidentified. As this case will be decided on another theory, we do not believe it is necessary to pass upon this question of presentation.

2. On December 6, 1919, the former chairman of the Board of Contract Adjustment, predecessor of the Appeal Section, War Department Claims Board, issued a memorandum on the jurisdiction of the Board of Contract Adjustment, now Appeal Section, War Department Claims Board, known as Memorandum 62, in part as follows:

"1. Until further instructions, the jurisdiction of the Secretary of War, under the act of March 2, 1919, will be held to be confined to claims arising out of the following circumstances: (a) In all cases it must appear that the alleged agreement was made in whole or in part for War Department purposes."

And on December 3, 1920, the War Department Claims Board, in defining the character of claims which the Secretary of War will undertake to adjust, pay, and discharge under the act of March 2, 1919, adopted the following resolution:

"*Resolved*, That it is the opinion of this Board that the jurisdiction of the Secretary of War under the act of March 2, 1919, 'to provide relief in cases of contracts connected with the prosecution of the war and for other purposes' does not extend to agreements entered into by any officer or agent acting under the authority, direction, or instruction of the President for other than War Department purposes."

3. The ships in question were purchased by Messrs. Baruch and Denman and were turned over to the United States Shipping Board; were controlled and allocated by the United States Shipping Board

to different parties on time-form charter during the entire possession of said ships by the United States Government; were sold by the United States Shipping Board and the money received by them.

4. Under these circumstances it can not be contended that these ships were purchased for War Department purposes, nor that any alleged contract between Messrs. Baruch and Denman, Baruch or Denman, or either of them, acting as agent of the President or otherwise, was entered into "for War Department purposes," with claimants, either in whole or in part.

5. In view of the memorandum above quoted of the former chairman of the Board of Contract Adjustment, now Appeal Section, War Department Claims Board, and the resolution of the War Department Claims Board, we are constrained to hold that the Secretary of War and this Board, as his agent, have no jurisdiction to entertain the claim herein, and all relief, therefore, must be denied.

DISPOSITION.

1. A final order denying relief will issue.

Lieut. Col. McKeeby and Capt. Marcum concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

DECEMBER 18, 1920.

Case No. 2480.

In re **CLAIM OF CHAMBERLAIN MACHINE WORKS.**

1. **CLAIM AND DECISION.**—Facts as stated in decision, in part denying and in part granting relief, reported in Volume VI, Part 1, page 246. On appeal the Secretary of War approved the opinion of the Board of Contract Adjustment except as to its decision with reference to item L, involving attorney's fees. As to this item the Secretary directed that the Appeal Section determine what amount, if any, of the attorney's fees claimed was reasonably and in good faith incurred in connection with the performance of the contract. The Appeal Section reconsidered the matter in the light of previous testimony and of additional affidavits filed and determined that the amount of attorney's fees so expended was \$1,000, and that claimant was entitled to the unamortized portion thereof, or the sum of \$624.

Lieut. Col. Smith writing the opinion of the Board.

ON RECONSIDERATION.

1. This case was decided by the Board of Contract Adjustment on June 12, 1920, the decision being in part favorable and in part adverse to claimant.

2. From that decision claimant noted an appeal to the Secretary of War, who, upon consideration of the record, under date of September 3, 1920, returned the record to the War Department Claims Board with the following order:

“Upon consideration of the record in this matter the decision of the Board is affirmed except with regard to item L, which represents attorney's fees alleged to have been incurred by the claimant directly in connection with the performance of the contract, claimant having employed an attorney to conduct certain negotiations with a view to effecting settlement of a strike which occurred in the course of the performance of the work. As to this item, it is directed that the Board determine whether any portion of the attorney's fees included in item L were reasonably and in good faith incurred in the performance of the work contemplated by the contract and that it allow such portion thereof, if any, as is found to be fairly applicable to the unperformed portion of the contract.”

3. In order that claimant might have an opportunity to introduce further testimony, if it so desired, claimant and its attorney were advised of the contents of the order of the Secretary of War and of a date when claimant might introduce further testimony. Upon that date Mr. John Betjeman, representing claimant, appeared before the

Appeal Section and presented additional affidavits. Mr. Betjeman was then advised by the committee that claimant would have opportunity to introduce further oral testimony if it so desired. On December 11, 1920, the committee received a letter from Mr. Betjeman, in which it is stated:

"It is not desired to introduce any further evidence or testimony relative to item L."

4. By direction of the Secretary of War as set forth in the foregoing order, the Appeal Section, War Department Claims Board, has reconsidered item L of the claim, which item was disallowed by the Board of Contract Adjustment, for the purpose of making the determination directed by the Secretary.

5. The amount claimed under item L is \$2,880.79 for fees paid an attorney. Mr. F. L. Chamberlain, president of claimant company, testified that \$1,185.47 of this expense had been incurred for legal services of Mr. Alfred Longley, an attorney, in connection with the contract and prior to its suspension, in handling claimant's interests in the adjustment of a strike at the plant; that the balance of item L was for the services of the attorney in the preparation and presentation of the claim. (R. p. 257.)

6. In an affidavit filed by claimant, Mr. Alfred Longley, of Waterloo, Iowa, a practicing attorney of that city, stated that he had been engaged in the practice of law in Waterloo for more than 20 years:

"I spent nearly all of my time in caring for the interests of the Chamberlain Machine Works as they were involved in the labor difficulty referred to, from the date named (Oct. 17, 1918) until the 15th day of November following * * *. That I charged the Chamberlain Machine Works one thousand dollars (\$1,000) for my services, and believe that they were reasonably worth the amount charged; * * *. That I have been paid on account of said services the sum of five hundred dollars (\$500)."

In the affidavit mentioned, Mr. Longley corrected a statement he had made in a previous affidavit that he had expended cash in the sum of \$185.47 in connection with the adjustment of the labor dispute, and stated that no expenditures of any substantial amount were made by him in connection with the strike. This correction read in connection with Mr. Chamberlain's testimony would reduce the item of attorney's fees on account of the strike to \$1,000.

7. It is the opinion of the Board that the charge made by Alfred Longley, Esq., for attorney's fees in connection with the settlement of the strike was reasonable and that the services of Mr. Longley were reasonably and in good faith incurred in the performance of the work contemplated by the contract, and that claimant should be allowed such portion of the \$1,000 so paid as the unfulfilled portion

of the contract bears to the entire contract, that is to say, claimant is entitled to an allowance under item L of \$624.

8. The decision of the Board of Contract Adjustment is modified in the particulars aforesaid, and as so modified the opinion of the Board of Contract Adjustment is affirmed.

DISPOSITION.

The Appeal Section, War Department Claims Board, hereby transmits its decision, together with the decision of the Board of Contract Adjustment, to the Ordnance Section for appropriate action.

Lieut. Col. McKeeby and Capt. Frazer concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

DECEMBER 18, 1920.

Case No. 3002.

In re **CLAIM OF KISSEL MOTOR CAR CO.**

- 1. JURISDICTION—TREASURY DEPARTMENT, TRANSMISSION OF CLAIM TO.**—Where an entire transaction for the manufacture of chassis involves separate orders and changes in specifications, and the claim is presented based on the entire transaction in which are both formal and informal agreements, and a certificate "C" has been issued by the Ordnance Section and an item award made, the claim will be transmitted to the Auditor for the War Department, although the particular item involved in the appeal arises out of a formal contract and formal amendments, and the Appeal Section will not undertake to determine the question of jurisdiction.
- 2. SECRETARY OF WAR, CONTRACT PROVISIONS FOR SETTLEMENT OF DISPUTES BY.**—Where, under the circumstances stated in paragraph 1, a claim is to be transmitted to the Auditor for the War Department and the contract out of which the dispute arises provides that the Secretary of War shall be the final arbiter of disputes under the contract, the Appeal Section, acting for the Secretary of War, will determine the dispute before transmitting the claim to the auditor.
- 3. CLAIM AND DECISION.**—Appeal from award of the Ordnance Section involving a dispute as to a contract for the manufacture of chassis in the sum of about \$45,000. Held, that the Secretary of War should determine the dispute and transmit the record to the Auditor for the War Department.

Lieut. Col. Smith writing the opinion of the Board.

ON RECONSIDERATION.

1. On October 9, 1920, a decision was rendered by this Board denying relief to claimant.

2. Thereafter on November 1, 1920, claimant filed an application for rehearing. In this application claimant states:

"F. That claim is on basis that contract was terminated and the major portion of the about \$1,500,000, of spare parts, and second order of 1,500 trucks, was not finished and only the balance of the original 2,000 truck order was completed.

"G. That we received due notice from the Government as to the terminating of contract or a part of same."

This application was considered by the standing committee on rehearings on November 9. In a memorandum to the chairman of this Board, the rehearings committee states:

"It was the unanimous opinion of the committee that there should be a reconsideration of the decision in order that Col. Smith may

make his findings and decision conform to new facts disclosed by claimant, and which were not in the record when the decision was written; this, however, without altering the conclusion reached in the original decision."

3. The original decision denied relief to claimant because of lack of jurisdiction arising from the fact that the contract had been fully completed. This conclusion was reached largely by reason of the following testimony of Mr. G. A. Kissel, president of claimant company (R. pp. 21 and 22) :

"Capt. SMITH. After receiving these contracts, and during the process of the contracts being prepared, you were engaged in performing the contracts, were you?"

"Mr. KISSEL. Yes, sir.

"Capt. SMITH. And the trucks were delivered to and accepted by the United States?"

"Mr. KISSEL. Yes, sir.

"Capt. SMITH. And you have been paid for them with the exception of this balance which you are now claiming?"

"Mr. KISSEL. Yes, sir.

"Capt. FRAZER. Mr. Kissel, did you complete only 2,000?"

"Mr. KISSEL. Yes, sir. Of course, we had that other order, you know, for 1,500 on which we had done some work, which was canceled, but we have had settlement for that."

4. On November 1, 1920, Mr. Kissel filed an affidavit in support of claimant's application for rehearing. In this affidavit Mr. Kissel states:

"That the findings of fact of the Appeal Section of the War Department Claims Board are not based on the facts as they exist, for the reason that the contract between the United States Government and the applicant was never completed, but was terminated by the War Department before the completion thereof."

5. Claimant has also filed with this board a memorandum dated November 3. This memorandum is in part as follows:

"8. This contract was not completed, but a large part, namely, almost \$1,800,000, of spare parts, was not completed, also the second order of 1,500 was terminated.

"9. That portion was terminated by telegram December 16, 1918."

6. Claimant presented to the rehearings committee a letter bearing the date of December 26, 1918, and has filed a copy thereof with the board, which letter is as follows:

"From: The Director of Purchase and Storage.

"To: Kissel Motor Car Co., Hartford, Wis.

"Subject: Termination of Contract C M E 518.

"1. Under date of December 16 the following telegram was sent:

"'Your contract number C M E five eighteen for F W D spare parts is hereby terminated in the public interested.'"

"2. This will confirm the same.

"By authority of the Director of Purchase.

(Signed) C. E. ROACH,
*Captain, Q. M. C., Motors, Branch,
 Contract Section, Motors and Vehicles Division."*

HML/HG

MS

(Rubber stamp as follows: "The Kissel Motor Car Co., accounting department (clock showing 10.20), December 30, 1918.")

7. The information thus disclosed since the hearing establishes the fact that the entire contract was not completed, as inadvertently testified to by Mr. Kissel and as stated in the original opinion, but that a considerable portion of the contract providing for spare parts was terminated or suspended December 16, 1918, and prior to January 1, 1919, the date to which time for performance was extended by the third supplemental contract dated September 12, 1918. (Claimant's Ex. 5, R. p. 95.) While the dispute is as to the terms of the contract and no item of claim involved in this appeal arises out of the terminated or suspended portion of the contract, or on account of the termination or suspension, yet the statement in our former opinion that the contract was fully performed was incorrect, as demonstrated by the subsequent information above referred to, and a reconsideration of the claim is deemed necessary. A rehearing was had on November 22, at which additional testimony was introduced.

FINDINGS OF FACT.

1. This is an appeal from a decision of the Ordnance Section on a claim for \$106,727.72, under the following circumstances:.

2. Claimant had a formal Ordnance Department contract dated December 20, 1917, whereby claimant agreed to make for the Government 2,000 3-ton chassis of F. W. D. Auto Co., Model B, sets of spares consisting of individual parts, assemblies and complete chassis, as specified by the contracting officer, approximating in value 30 per cent of the cost of said 2,000 chassis, and in accordance with the drawings and specifications attached to the contract and marked "Schedule 1" and made a part of the contract.

3. The provisions of the contract material to this controversy are as follows:

"ARTICLE IV. The United States will make the following payments to the contractor:

"(1) The sum of two hundred twenty-five dollars (\$225) for each chassis delivered, as a fixed profit, ninety per cent (90%) of which shall be paid upon the proper certificate of the contracting officer showing delivery and acceptance of chassis during the performance of the contract, and the remainder upon the completion of the con-

tract. Such fixed profit is subject to addition or deduction as hereinafter provided.

"(2) The sum of sixty-seven and 50/100 dollars (\$67.50) for each quantity of spares delivered, aggregating in cost thirty per cent (30%) of the cost of a complete chassis, as a fixed profit, will be paid from time to time, in proportion to the value of the spare parts delivered, upon the proper certificate of the contracting officer showing delivery and acceptance of said quantity of spares during the performance of the contract. Such fixed profit is subject to addition or deduction as hereinafter provided.

"(3) The United States shall add to fixed profit, or deduct from fixed profit, as the case may be, under the following adjustments:

"(a) The estimated cost of each chassis upon which the fixed profit is based is \$2,850.

"Immediately upon the completion of the contract, or its termination by the United States for reasons other than default of the contractor, the entire actual cost of the articles delivered and accepted shall be determined by the contracting officer in accordance with the provisions of this contract. If, after subtracting alike from actual and estimated cost, such costs, if any, as may be fixed and agreed upon, and the actual cost of raw material, supplies, and the like paid for by the United States, the actual cost (after subtractions), shall be found to exceed the estimate (after subtractions), the United States shall deduct from payments to be made to the contractor on account of fixed profit two (2%) per cent of such difference, provided always that the fixed profit after such adjustment shall not be less than \$215 per chassis delivered. If, however, the actual cost (after subtractions) shall be found to be less than the estimate (after subtractions), the United States shall immediately pay the contractor, in addition to the fixed profit already paid, all fixed profits withheld and twenty-five (25%) per cent of such difference, provided always that the fixed profit after such addition shall not be more than \$400 per chassis delivered. The additional cost necessitated by defects in material furnished by the United States and not purchased by the contractor shall not be included in the determination of actual cost for the purpose of this subdivision (a). * * *

"ARTICLE V. * * * The decision of the contracting officer on all questions of the allowance and determination of cost and the payment thereof shall be final, except that either upon the completion of the contract by the contractor, or its termination by the United States, or whenever claims of cost amounting in the aggregate to \$10,000 shall have been disallowed or determined adversely to the contractor by the contracting officer, the contractor may appeal to the Chief of Ordnance by filing one statement of claim which shall embrace all claims of cost previously disallowed or adversely determined, provided that all such claims shall be certified by an accountant designated by the contracting officer as being in their entirety the subject of expenditure of or cost to the contractor.

* * * * *

"ARTICLE XXII. Except as this contract shall otherwise provide, any doubts or disputes which may arise as to the meaning of anything in this contract shall be referred to the Chief of Ordnance for determination. If, however, the contractor shall feel aggrieved at

any decision of the Chief of Ordnance upon such reference he shall have the right to submit the same to the Secretary of War, whose decision shall be final."

Schedule 1 is in part as follows:

"SCHEDULE 1.—*Specifications and drawings.*

"To be in all particulars of the same design, form, workmanship, and materials as the said 3-ton chassis that are being furnished on this date by the F. W. D. Auto Co. to the Ordnance Department, together with the following special features: Attaching and furnishing Stewart Warner speedometers, transoms as per drawings herein, pintle as per drawings herein, impulse starter, steel wheels, 26" x 6" demountable tires. Oil side and tail lamps, gas lamps and acetylene generators (furnished by U. S. A., attached by Kissel Motor Car Company), Pyrene fire extinguishers (furnished by U. S. A., attached by Kissel Motor Car Company), raising steering mechanism, and such other minor changes that may be agreed upon. Also to comply in every particular with the standard as demanded by the Ordnance Department for such vehicles as per conditions set forth in Form 552, which is attached hereto and made a part hereof with the following exceptions: * * *."

Schedule 1 also provides that paragraph 265 of Form 552 above referred to shall be amended by the addition of the words: "An Ordnance Department name plate."

Paragraph 265 of the pamphlet referred to follows paragraph 264, which provides:

"The following equipment is to be placed on and shipped with each individual truck. This equipment must not be shipped separately."

4. The original contract provides that claimant shall furnish and attach steel wheels to the chassis, and that the Government shall furnish and claimant attach oil side and tail lamps, gas lamps, and acetylene generators, whereas claimant contends that at the time the contract was signed the understanding between claimant's president, Mr. G. A. Kissel, and Maj. W. E. Wall, who negotiated the contract, was that the Government would furnish the steel wheels and claimant would furnish the lamps and generators. Claimant's president, Mr. G. A. Kissel, so testified. He further testified that when he discovered the mistake in the contract, realizing that delay would result in sending the contract back for correction, he signed the contract and at once took the matter of correcting the mistake up with claimant's representative, Mr. Roger M. Newbold, who was then in Washington, and instructed him to secure an amendment to the contract which should embody in the respects aforesaid the correct understanding which Mr. Kissel and Maj. W. E. Wall had, that is, that claimant should furnish the lamps and generators and that the Government

would furnish the steel wheels, and that the cost of the wheels would not be taken into account in determining whether or not the "bogie" price of \$2,850 was or was not exceeded by the actual cost of manufacture of the chassis.

5. Through the efforts of Mr. Newbold, a "First supplemental contract," dated May 6, 1918, was entered into. This contract, after referring to the contract of December 20, 1917, states the desire of the parties "to amend and supplement such agreement as hereinafter provided, in order to set forth a certain part of the original understanding which was omitted through oversight from the original contract." This supplemental contract is proxy signed, and since the identical provisions with reference to the lamps, acetylene generator, and steel wheels are contained in a "Second supplemental contract," dated July 15, 1918, which contract is formally executed, other provisions of the first supplemental contract are not set out.

6. The second supplemental contract recites that the parties desire to amend and supplement the agreement of December 20, 1917, "so as to provide for the sets of spare parts to be furnished by the contractor, and so as to provide for certain additional items to be furnished for the chassis by the contractor and by the United States, which items were omitted from the original contract through inadvertence." Article I of the second supplemental contract provides for the spare parts to be furnished. Article II provides for the method of packing and shipment. Article III provides for claimant's compensation. Article IV is as follows:

"ARTICLE IV. The contractor agrees to furnish oil side lamps and tail lamps for the chassis. The United States agrees to furnish f. o. b. cars contractor's plant, without cost to contractor, 2,000 sets of cast-steel wheels and 2,000 name plates at such times and in such quantities as will enable the contractor to perform all the terms of said contract. Such wheels and name plates shall remain the property of the United States, and the contractor agrees to use due and proper care in the handling and storing of same while in its possession. The provisions of this article were omitted from the original contract through inadvertence."

7. The original contract was further modified by a "Third supplemental contract," dated September 12, 1918. The third supplemental contract provides that the contractor should manufacture and deliver tops for said chassis and mount the same, and that the contractor would furnish 2,000 thereof, and in the event that the contractor was unable to mount the tops on any chassis theretofore delivered, that the contractor should pack the same for export shipment without additional cost to the Government for such packing; that the Government would pay claimant \$39 for each complete top; that for extra work in connection with removing the iron and upholstery

upon 500 seats of the chassis made necessary by the mounting of the tops, and for extra work in replacing the upholstering, the Government would pay claimant the additional sum of \$2.50 for each of such 500 seats. Though not provided in the contract, Mr. Kissel testified that on account of changes and additions to the specifications and because the supplemental contract providing for claimant to furnish the tops, the "bogie" price of the chassis was increased \$7.20, making the total "bogie" price \$2,857.20. This statement is corroborated by a certificate of the contracting officer dated May 2, 1919, by requisition for amendment No. 5, dated April 30, 1919, and by an undated memorandum signed by L. B. Moody, Colonel Ordnance.

8. By letter from the Acting Quartermaster General, Motors Division, Contract Section, dated September 25, 1918 (Cl. Ex. 7, R. p. 118), claimant was advised that its contract would be further amended so as to provide for 1,500 additional trucks to be delivered during the months of February, March, and April, 1919, and that contract covering the amendment would follow in a few days. No formal contract for the 1,500 additional trucks was executed. However, claimant began work on the 1,500 trucks pursuant to oral instructions (R. 122).

9. About October 23, 1918, claimant received the following letter:

WAR DEPARTMENT,
OFFICE OF THE QUARTERMASTER GENERAL OF THE ARMY,
Washington, October 21, 1918.

In answer refer to File No. 451.2-MT.

No. —.

From: The Quartermaster General.

To: The Kissel Motor Car Co., Hartford, Wis.

Subject: Second series F. W. D. orders.

1. This will acknowledge and answer your letter of October 14, relative to the above.

2. Be advised that under the new contract to be prepared the contractor will be called upon to furnish everything, including the steel wheels, the gas headlight, and generator. A higher bogie price will be named and the profit of the contractor increased accordingly.

3. Full details will be furnished your company in the shape of a contract within a few days.

By authority of the Acting Quartermaster General.

H. M. LEWY,
*Captain, Q. M. C. Contract Section,
Motors Branch, Motors and Vehicles Division.*

HML/OLC

(Claimant's Ex. 9, R. p. 135.)

The higher bogie price was later fixed at \$3,183 (R. p. 136).

10. About November 14, 1918, claimant received a telegram of that date notifying it that the contract for 1,500 chassis "Is hereby ter-

minated in the public interest as provided in your contract." (Claimant's Ex. 8, R. p. 120.)

11. About December 16, 1918, claimant received the telegram of that date, set out in the letter heretofore quoted, dated December 26, 1918, notifying claimant that its contract for spare parts "is hereby terminated in the public interest." (Claimant's Ex. 6, R. p. 111.)

Pursuant to the notices contained in the telegrams of November 14 and December 16, claimant suspended work on the additional 1,500 chassis and also on the spare parts.

12. After the armistice claimant was requested by the Ordnance Department to extend its deliveries and to reduce the number of hours during which labor was employed, so as to keep the maximum number of men employed and thereby disturb labor conditions as little as possible (R. p. 143). Otherwise all the chassis and spare parts would have been completed and delivered before January 1, 1919, the time limit fixed by the third supplemental agreement (R. p. 144). By reason of such request final deliveries were not made until about June, 1919.

The correspondence supplied by claimant following the hearing is conclusive of the fact that claimant was requested to reduce its working hours, so as to keep its labor employed at minimum hours in order that there would be a minimum disturbance of labor due to the cessation of hostilities.

13. Notwithstanding the word "terminated" was used in the telegrams of November 14 (Claimant's Ex. 8, R. p. 120) and December 16, 1918, the correspondence supplied by claimant shows that the order for 1,500 additional chassis, and that portion of the formal contract providing for spare parts, was intended by the Government only to be suspended, as will be seen by reference to such correspondence.

The letter of November 20 from the Zone Supply Officer refers to the "suspension" request, and invites attention to Supply Circular 111 as covering "the method under which settlement will be made on this suspension of contract."

14. Some question arose as to whether the order for 1,500 additional chassis was an amendment contract, 518, or whether it was to take the form of a new contract, as the telegram of November 14 referred to Contract No. 1285 for 1,500 chassis, claimant having incurred expense in connection with the additional order for 1,500 chassis under contract 518 (the contract for 2,000 chassis and spare parts). In a letter dated November 19, 1918, to the Contract Section, Motors and Vehicles Division, Motors Branch, claimant asked that this discrepancy be cleared up and was advised by Capt. H. W. Lewy "that it was impossible to provide an amendment to your

contract CME 518, as originally advised, and that the contract 1285 was substituted therefor." The letter also stated that—

"You have heretofore received a copy of the termination and cancellation clause as it appears in the new contract, which will govern such adjustment, if any, as may be necessary in this case."

15. Mr. Kissel testified that an estimate of the cost of the material, showing how the "bogie" price was arrived at, was submitted to him, and that Maj. Wall called his attention to the fact that the cost of the wood wheels had been eliminated. (R. p. 148.) Mr. Kissel also testified that the cost of the steel wheels was not included in the bogie price.

16. There is in the file a letter from former Maj. W. G. Wall, dated September 23, 1920, addressed to this section, in which he states in part as follows:

"The original idea was that these trucks should have wood wheels; then it was later decided that they should be equipped with steel wheels, which should be supplied by the Government, the bogie price being increased by the difference between the steel wheels and the wood wheels, also by the addition of several other items, which were later added.

"However, we can not see where the original contract has much to do with this case, as the supplemental contract, whether it does so rightfully or not, was issued to interpret the meaning of the original contract."

17. In presenting its claim claimant presented it as based on its combined dealings, and involving the amount remaining unpaid on the contract as amended, as claimant understood it, for the 2,000 chassis and the spare parts, and also on account of damages arising by reason of the suspension of the informal contract for the 1,500 additional chassis.

18. The Ordnance Claims Board issued its certificate C and made an item award, which were accepted by claimant. It also made a final award which claimant refused and from which it appealed to this section.

Doubtless the Ordnance Claims Board was influenced by its previous ruling in "Claims Board Circular No. 65," in which it held that "contracts properly executed, but followed by a supplemental contract not properly executed in behalf of the United States" was informal.

The original contract in question was formal, the first amendment was informal, but all of its provisions were included in subsequent formal supplemental contracts.

19. The only issues on this appeal are:

(a) Whether in determining claimant's profit the cost of the steel wheels should be included as part of the cost.

(b) Whether claimant is entitled to interest on its claim.

The Ordnance Claims Board included the cost of the steel wheels in computing the cost of the chassis, and disallowed the item of interest.

The question as to whether the Ordnance Claims Board was right in considering the cost of the steel wheels as a part of the cost of the chassis is one of interpretation under the original contract and its formal amendments, and upon this determination rests claimant's right to recover additional compensation for the 2,000 chassis delivered, amounting to some \$45,000.

DECISION.

1. At the threshold we are met by a question of jurisdiction. If the contract out of which the claim arises was a formal one and terminated in part by performance and in part by the notice contained in the telegram of December 16, 1918, the Secretary of War has lost jurisdiction to settle the claim through the medium of a supplemental contract.

It is, however, the view of this Board that the telegram of December 16 did not effect the termination of the contract as to the spare parts, but merely suspended the operation of the portion of the contract relating to spare parts, and that the use of the word "terminated" in the telegram was intended to mean "suspended," as shown by the subsequent correspondence from Government officials relative to the matter.

If the claim should be considered as based on an informal agreement, as it has been regarded by the Ordnance Claims Board by issuing its certificate C and by making the item award, and by the War Department Claims Board in approving the award, then the Secretary of War has jurisdiction to adjust the claim by a statutory award under the Dent Act; or if the contract, though formal, is alive, merely suspended, the Secretary still has authority to adjust it by supplemental contract.

In view of the previous correspondence between the Department of the Treasury and the War Department, it is believed that this claim arises under such circumstances as require its submission to the Treasury Department and, therefore, that this Board should not undertake to determine the question of jurisdiction.

However, since the contract constitutes the Secretary of War the final arbiter of disputes under the contract, it is believed that before transmitting the record to the Department of the Treasury the Secretary of War, through this Board, should determine the dispute in order that the Treasury Department may have before it the ruling of the Secretary, in case it shall determine that under the circumstances surrounding the claim the Secretary of War has no jurisdiction to adjust it.

2. It is clear that the original oral agreement between claimant and the Ordnance Department was that the Government would furnish the steel wheels and that their cost should not be charged against claimant in determining its contingent profit, and that claimant should furnish the lamps and acetylene generators. In drawing up the contract, these provisions were inadvertently transposed, so that the contract obligated claimant to furnish the steel wheels, which of necessity would make the wheel expense a part of the actual cost of the chassis. This error was corrected by the proxy-signed supplemental contract dated May 6, 1918 (Cl. Ex. 3, R. 88), executed for the avowed purpose of correcting the error. This correction was reaffirmed in the formally executed second supplemental contract dated July 15, 1918 (Cl. Ex. 4, R. 91), and recognized in the third supplemental contract dated September 12, 1918 (Cl. Ex. 5, R. 96).

3. The provisions inserted in the formally executed second supplemental contract material to this controversy are as follows (R. pp. 92, 93, 94) :

“Whereas the parties desire to amend and supplement said agreement in the interest of the United States, as hereinafter set forth, so as to provide for the sets of spare parts to be furnished by the contractor, and so as to provide for certain additional items to be furnished for the chassis by the contractor and by the United States, which items were omitted from the original contract through inadvertence.

“Now, therefore, * * * in consideration of the mutual agreements herein contained, the said parties have agreed * * * as follows:

* * * * *

“ARTICLE IV. The contractor agrees to furnish oil side lamps and tail lamps for the chassis. The United States agrees to furnish f. o. b. cars contractor's plant, without cost to the contractor, 2,000 sets of cast-steel wheels and 2,000 name plates * * * The provisions of this article were omitted from the original contract through inadvertence.”

4. It is material to determine whether the clause “the United States agrees to furnish f. o. b. cars at contractor's plant without cost to the contractor” was intended to eliminate the cost of the steel wheels from the actual cost of the chassis, in order that claimant's compensation, in addition to the fixed profit, may be calculated, as under the contract if the actual cost be less than the bogie price of \$2,850, claimant is entitled to 25 per cent of the difference between the actual cost and the bogie price, as part of its compensation for the chassis delivered.

5. Article IV of the contract provides that in determining claimant's compensation, if any, in addition to the fixed profit, there shall be deducted alike from the actual and estimated cost,

(a) "Such costs, if any, as may be fixed and agreed upon";

(b) "The actual cost of all raw material, supplies, and the like paid for by the United States,"

and that if the actual cost so determined shall exceed the estimate after such deductions, 2 per cent of such difference shall be deducted from the fixed profit; but if such actual cost after deductions is less than the estimated cost after such deductions, the claimant shall be entitled to 25 per cent of the difference.

If, with reference to the steel wheels, the contract had provided, as it did with reference to the Pyrene fire extinguishers, simply that they should be furnished by the United States and be attached by claimant, then there could be no reasonable contention, but that the cost of the steel wheels, under the provisions above quoted marked (b), should be included as a part of the actual cost of the chassis. Such inclusion would be indirectly an item of cost to claimant—though it had not actually paid therefor—since the inclusion of the cost of the fire extinguishers would, as a matter of fact, actually cost claimant the amount by which claimant's contingent profit would be reduced thereby. But the contract provision with reference to the furnishing of the steel wheels goes further and requires that they shall be furnished "without cost to the contractor." Effect should be given to all the contract provisions, if possible, by any reasonable interpretation, and since the contract was prepared by the Government, it should be most strongly construed against it, as the ordinary rules of construction apply to it in its contractual capacity as apply to individual contractors. The context, and in fact the whole instrument, including the amendments, should be taken into consideration in arriving at the true intent of the parties. Considering the words "without cost to the contractor" in their ordinary sense, aided by the ordinary rules of construction, we are drawn to the inevitable conclusion that they mean, and were intended to mean, that on account of the Government furnishing the steel wheels there should be no element of cost to the contractor either direct or indirect.

This construction does not render the provisions of the supplemental contract just referred to inconsistent with, or contradictory to the provisions of Article IV of the original contract, quoted above as (b), which provides for deducting alike from the actual cost and bogie price of the chassis the cost of materials paid for by the Government. The requirement in the supplemental contract may be considered as a proviso to Article IV of the original contract limiting the items of cost to be taken into consideration, and therefore the

provisions of Article IV and of the supplemental contract may stand together.

6. It therefore is the opinion of this Board, in determining the contingent profit to which claimant is entitled on the 2,000 chassis manufactured by it and delivered to and accepted by the Government, that the cost of the steel wheels should not be taken into consideration. In reaching this conclusion this Board has determined for the Secretary of War, pursuant to authority vested in him by the terms of the contract, the dispute regarding its terms.

7. This Board has reached its conclusion solely from a consideration of the written instrument itself and on the theory that there is no ambiguity in it in the respects considered. However, even if it should be considered that the words "without cost to the contractor" render the contract provisions under consideration ambiguous, the same conclusion must inevitably follow, as we are then at liberty to consider evidence *de hors* the instrument, including the circumstances surrounding its execution, in arriving at the real intention of the parties. In this connection Mr. Kissel testified that the original understanding was as interpreted by this Board and that the purpose of the amendment was to correctly recite such understanding. Such interpretation is supported by the purpose of the Ordnance Department in providing for contingent profit in addition to the fixed profit. It is evident that such purpose was to reward claimant for its economy and efficiency to the fullest extent. By including the cost of the steel wheels as a part of the actual cost of the chassis, without making a corresponding addition to the bogie price, which claimant's president testifies was not done, claimant's opportunity to profit through its industry, economy, and efficiency was lessened by the amount of such included cost, and thus to this extent the purpose of the Ordnance Department was thwarted.

8. As to the item of interest, it is not claimed that it is allowable because of any written agreement or statutory provision, but it is admitted that it is a simple claim for interest on the amount that claimant believes to be due it by the Government as on ordinary account. In view of section 1186, United States Compiled Statutes, this item is clearly not allowable.

DISPOSITION.

The War Department Claims Board, Appeal Section, will transmit this decision to the Auditor for the War Department for his information and appropriate action.

Lieut. Col. McKeeby and Capt. Frazer concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

DECEMBER 18, 1920.

Case No. 3021.

In re CLAIM OF LUTZ COMPANY (INC.).

- 1. CLAIM AND DECISION.**—This is an appeal from the disallowance of a number of items by the Ordnance Section in an award under a suspended proxy-signed contract. The individual items are discussed and the action of the Ordnance Section affirmed.

Maj. Hill writing the opinion of the Board.

FINDINGS OF FACT.

This is a claim, class A, under the act of March 2, 1919, for \$78,762.62, on appeal from an award of the Ordnance Section. A hearing has been had upon this claim.

1. On June 10, 1918, claimant entered into a proxy-signed contract No. 9595-747C with the Ordnance Department for the rough machining of 1,000 recoil forgings for 75-mm. field guns at a unit price of \$105 each. The forgings were to be supplied by the United States, and in this instance were made by the Carbon Steel Co. Upon the date of July 27, 1918, a supplemental contract was entered into whereby the United States agreed to pay for increased facilities in the shape of four planers, two drill presses, two slotters, and one double dallet drilling device with jigs and fixtures to enable the contractor to increase the rate of delivery. It also provided that claimant should be reimbursed for the labor performed in the installation of these facilities. Under date of July 31, 1918, a second supplemental contract was entered into whereby the Government agreed to advance to claimant the sum of \$30,000.

2. Prior to the contract of March 10, claimant had entered into two contracts with the French Government for machining of recoil forgings, and was in production thereunder. The first contract was for the machining of 1,000 forgings at \$177.50 each and the second for 1,020 forgings at \$120 each. The forgings for these contracts were to be furnished by the French Government and were secured from the Pollack Steel Co. The demand for these forgings was very urgent and it was arranged between the French Government and the United States that the first 10 forgings to be completed each day should be allocated to the French Government and that the United States would take the production over that amount. The contract

with the United States was suspended December 10, 1918, and up to that time the rate of production had never exceeded 10 forgings per day and as a result all of the forgings produced were delivered to the French Government.

3. Under date of October 1, 1919, the Ordnance Claims Board issued its Certificate Form C.

4. During the negotiations resulting in the contract dated June 10, the claimant prepared an estimate No. 2290, setting forth certain additional machinery and equipment which would be required for the performance of this contract and the cost of which was included in the contract price of \$105 per forging. Claimant submitted another estimate, No. 2290-B, dated July 11, in which the cost of the additional facilities as provided under the supplemental contract dated July 27, 1918, was stated to be \$56,648.

5. Claimant received 497 forgings from the Carbon Steel Co. which it machined on planers intended for use in the performance of the United States contract and which were delivered to and paid for by the French Government. For 366 of these forgings the claimant received contract price under its first contract, \$177.50, and on the balance of 131, claimant received the contract price under the second French contract, \$120 each. If these 497 forgings had been applied to the United States contract, claimant would have received \$105 each instead of the amounts received under the French contracts. It received approximately \$28,000 more from the French Government than it would have received under the United States contract.

6. Claimant contends, however, that it was through no fault of its own that the forgings machined on the equipment intended for the United States contract were not delivered to the United States. It contends that the arrangements for delivery of the first 10 each day to the French Government was not of its own making, and that in any event if the United States had furnished a sufficient number of forgings it would have machined sufficient to make deliveries under both the French and American contracts.

DECISION.

1. The separate items of the claim are made up as follows:

(a) Cost of machinery, tools, jigs, fixtures, temporary storage sheds, etc., and setting up charges-----	\$32, 694. 36
(b) Repairs to machinery and miscellaneous merchandise applicable to same-----	10, 003. 50
(c) Machine work on preliminary forgings-----	259. 20
(d) Clipping and filing forgings furnished by the Carbon Steel Co-----	1, 572. 38
(e) Engineering and designing-----	5, 250. 00

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(f) Work on defective forgings furnished by the Carbon Steel Co.....	\$548. 63
(g) Item has been withdrawn at request of claimant.....	-----
(h) Loss on shop operations due to cancellation of contract.....	6, 000. 00
(i) Supplemental contract for additional equipment.....	5, 132. 53
(j) Interest claimed at 6 per cent from Dec. 13, 1918, to May 13, 1919, on the total amount claimed, \$61,541.....	3, 692. 46
(k) Supplemental claim for 2 Bickett planers, including freight, hauling, foundations, and countershafts.....	13, 529. 16
(l) Deductions and counter claims:	
Advanced payment.....	30, 000. 00
Interest on advanced payment to Sept. 30, 1919.....	2, 235. 00
Spoiled forgings	353. 30
Amount charged for use of United States equipment.....	929. 15

2. The decision of the appeal committee of the Ordnance Section upon which the award offered by the Ordnance Claims Board was based was as follows:

“That all items of the claim be entirely disallowed with the exception of the following items:

“(a) That this item be allowed as to the machinery and tools included in estimate 2290, dated May 28, 1918, and subsequently purchased by the appellant in addition to the equipment provided for under the supplemental agreement of July 27, 1918; that it be disallowed as to any other machinery and tools. Setting up charges should be included. Proper salvage value of the equipment concerned should be deducted, and 50 per cent of the remainder allowed to appellant.

“(i) That the appellant be paid at the rate of \$2.50 an hour for direct labor performed in the installation of facilities under the supplemental contract and that this price shall be considered as including all overhead and administration charges incurred in the installation of said facilities. That otherwise the finding of the district board be approved. (The amount due under this item appears to be properly payable on voucher, as included under the supplemental contract providing for the increased facilities.)

“(l) That a counter claim be asserted for \$30,000 advance payment plus interest to date of settlement. That a counter claim be asserted for \$338.30, this amount representing the cost of one spoiled forging less salvage value. That the counter claim of \$929.15 for use of United States equipment be disapproved.”

3. *Item (a).*—It is the opinion of this section that the allowance under item (a) by the Ordnance Section is correct. Claimant is entitled to compensation on machinery listed on estimate No. 2290, which was specifically purchased for use upon this contract and cost of which was included in the price of \$105 per forging. While it is true that no forgings for the United States were machined upon this equipment, the equipment was used in machining approximately 500 forgings received from the Carbon Steel Co. and delivered to and paid for by the French Government. It appears proper that this

equipment should, therefore, be considered as amortized to the amount of 50 per cent.

4. *Item (b).*—Claimant contends, in substance, that certain machinery which it purchased on recommendation of Ordnance officers as being suitable for the work proved defective immediately upon being put in use and that it was obliged to replace gears and make other repairs in consequence at an expense of \$10,003.50. It does not appear that the Government in any way guaranteed this machinery, that its action was any more than indicating a source from which claimant might procure machinery and that no responsibility for the performance of the same was undertaken. It also appears that this machinery became broken in the machining of the forgings delivered to and paid for by the French Government. It is therefore the opinion of this section that this item was properly disallowed.

5. *Item (c).*—This item is for machine work on forgings done before the contract of June 10, with a view to finding what, if any, changes were necessary in the forgings to fit them for machining under the United States contract. This item might well become the subject of an allowance on quantum meruit were it not for the statement in claimant's letter, dated June 18, 1920, to the Ordnance Claims Board: "We agreed with Capt. Harrison to apply this expense to the contract under consideration."

6. *Items (d) and (f).*—Item (d) is for chipping and filing forgings furnished by the Carbon Steel Co. in ascertaining the depths of defects appearing on the surface of the forgings, and item (f) for work done on forgings furnished by the Carbon Steel Co. which proved defective. Claimant relies, as to these items, upon statements from Capt. Harrison that such allowances would be made. These negotiations, however, were all prior to the execution of the contract and are not provided for in the contract. It is further true that these forgings were delivered to the French Government, and it appears from letter dated August 7, 1919, from the French High Commission to claimant that these charges were assumed by the French Government. It is the opinion of this section that these items were properly disallowed.

7. *Item (e).*—Claimant states that this item refers to engineering work done in conjunction with the forgings, to numerous conferences with the Ordnance Department officials and French officials, and to work done prior to the contract in trying to arrive at an understanding as to what the contract would cover; that the item is made up of time expended on engineering, of traveling expenses and hotel bills. It is the opinion of this section that this item is chargeable to overhead and was properly disallowed here.

8. *Item (g)* was withdrawn by claimant..

9. *Item (h).*—This item is for loss on shop operations due to cancellation of contract. Mr. Lutz testified that this item was based on the fact that the Government-owned equipment was allowed to remain at claimant's plant from the date of suspension, December 10, 1918, to July, 1919, and that this loss was due to the fact that claimant was unable to make use of its entire shop until the machinery was removed. The last paragraph of article 1, of the supplemental contract, dated July 27, 1918, for increased facilities, provided that "All increased facilities which are the property of the United States will be removed without cost to the contractor within one year after completion of the performance of this contract, or additional contracts in the performance of which such increased facilities are used." Inasmuch as the machinery was moved within the time limit, there is no liability on the Government thereunder. This item was properly disallowed.

10. *Item (i).*—Under this item the Ordnance Claims Board allowed the sum of \$4,595.03, covering the cost of certain additional equipment provided under supplemental contract of July 27, 1918, which had not already been paid for and the labor cost of installing such facilities at the rate of \$2.50 per hour. Claimant is allowed this amount based on the audit of the Philadelphia district board. It does not appear that the claimant is entitled to any further sum.

11. *Item (j).*—This item is for interest on the amount here claimed. It has been consistently held that interest will not be paid except where provided by statute or by the terms of the contract itself. In the absence of any specific agreement this item was, therefore, properly disallowed.

12. *Item (k).*—This item is for cost and expense in connection with the purchase of two Bickett planers which claimant purchased to supplant two old type planers which it had in its factory and which were intended to be used on the United States contract. The old type planers were then used on other work. These planers were not included in the estimate of machinery No. 2290 which was considered, and the cost of which was included in the price of \$105 per forging, nor was it included in the machinery authorized to be purchased by the supplemental agreement of July 27, 1918. It is, therefore, the opinion of this section that this item was properly disallowed.

13. *Item (l).*—This item consists of proper deductions due the United States account of its advance payment of \$30,000, plus interest, and the cost of one forging, plus freight, furnished by the United States, which was spoiled by claimant, less a scrap value of \$15. A further counterclaim of an amount charged for the United States equipment is not proper in view of the fact that the equipment purchased by claimant under the original estimate has been considered

as amortized to the extent of 50 per cent by its use in machining forgings delivered to the French Government.

14. Based upon these findings, the Ordnance Claims Board made an award to claimant of a total amount of \$7,882.74, composed of the item of \$3,287.71, the unamortized portion of the cost of facilities, and \$4,595.03, the unpaid cost of increased facilities, from which was deducted the sum of \$338.30 for the spoiled forging and \$30,000, plus interest, for the war credits loan, making a net award of \$22,455.56, plus interest, due the United States. This award of the Ordnance Claims Board is approved and affirmed.

DISPOSITION.

The Appeal Section transmits its decision to the Ordnance Section for action in accordance with the opinion.

Lieut. Col. McKeeby concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

DECEMBER 20, 1920.

Case No. 2998.

In re **CLAIM OF MAXWELL MOTOR CO.**

1. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$49,143.35 (after deducting salvage offer) based upon oral agreements for furnishing numerous items of furniture and fixtures, equipment and facilities in connection with several formal cost-plus contracts. Held, claimant is entitled to relief on certain items.

Maj. Hill writing the opinion of the Board.

This is a class B claim under the act of March 2, 1919, for \$49,143.35 (after deducting salvage offer) for sundry items of office furniture and other facilities alleged to have been furnished by claimant upon request of various officers for use in connection with several formal cost-plus contracts.

A hearing has been had upon this claim.

FINDINGS OF FACT.

1. Claimant in 1918 was engaged upon several formal cost-plus contracts with the Ordnance Department for the making of tanks, tractors, and parts. The work was being done at its Chalmers, Dayton, and New Castle plants. At each of these plants inspection, engineering, production, and accounting officers were stationed to supervise the work. Upon request of various officers claimant supplied furnishings and fixtures for offices, equipment, and facilities for increasing production under the contracts. When bills for these items were presented to the accounting office force it became apparent that the items could not be allocated to any particular contracts because their use was general upon all contracts. Negotiations were begun looking toward the execution of a facilities contract to cover these various items, but the negotiations were interrupted by the armistice.

2. The items here claimed were first included in the proposed settlement of the formal contracts, but were under instructions separated and presented in their present form. The detailed statement is contained in Exhibit R attached to the file.

3. At the New Castle plant, First Lieut. Harry A. Mitchell, Ordnance, Army inspector of ordnance, made the requests upon which various items were furnished by claimant.

4. At the Chalmers plant, Capt. Norris W. Osborn, Ordnance, Army inspector of ordnance, and First Lieut. B. M. Lasley, Ord-

nance, in charge of engineering in the development of the 5-ton tractor, requested various items which were furnished by claimant.

5. At the Dayton plant, Capt. Albert G. F. Buehler, Ordnance, Army inspector of ordnance; Capt. J. B. Bubb, Ordnance; and Capt. Frank M. Seig, Ordnance, in charge of engineering in the development of 6-ton tractors, requested various items which were furnished by claimant.

6. The claim includes items for the cost of additions to the buildings A and D at Dayton, which were begun but not completed. Mr. Louis J. Horowitz, Assistant Chief of Ordnance, in charge of tanks, stated that during September, October, and November he was negotiating with Mr. W. L. Mitchell, president of claimant company, for terms upon which production of 6-ton tanks could be increased; that he tried to persuade Mr. Mitchell to increase facilities with a view to absorbing the cost of new buildings in the price to be received for future tanks; that Mr. Mitchell declined to consent to this arrangement, but that Mr. Mitchell did yield to his request to undertake construction of additional facilities at Dayton in advance of method for their payment being definitely settled; and that the armistice was declared while negotiations were pending. Claimant was then instructed to cease work on the new building project.

DECISION.

1. It is the opinion of this section that in 1918, prior to November 12, claimant supplied various items of furniture and fixtures, equipment and facilities listed below upon the requests of Mr. Louis J. Horowitz, Assistant Chief of Ordnance; Capt. Albert G. F. Buehler, Ordnance; Capt. J. B. Bubb, Ordnance, and Capt. Frank M. Seig, Ordnance; Capt. Norris W. Osborn, Ordnance, and First Lieut. B. M. Lasley, Ordnance; First Lieut. Harry A. Mitchell, Ordnance, and that agreements thereby arose whereby the Government is obligated to reimburse claimant for its expenditures for such items. This Board is unable to determine without an audit whether claimant has been reimbursed for any of the items included herein, or whether the price set against each item is correct. An audit will be made for these purposes before any payments are made hereunder.

NEW CASTLE PLANT.

2. The following items were supplied at the request of Lieut. Harry A. Mitchell:

Install hand-power crane and trolley system, C. W. O. 21644-----	\$342. 11
Build private office and consultation room on ground floor west of receiving room, C. W. O. 2378-----	115. 55
Install heating system in private office and consultation room on ground floor west of receiving room, C. W. O. 2379-----	106. 62

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Install ten tally boards in above office, C. W. O. 2491-----	\$81. 18
Build three office rooms 10 by 20 feet each for Ordnance and Stores Government men, C. W. O. 7246-----	588. 59
Build inspection office for Government inspectors, C. W. O. 8311-----	175. 94
Build office for Government accountants, third floor, C. W. O. 8345-----	75. 63
Addition to ordnance office, first floor, C. W. O. 21609-----	455. 69
Build stock bins 20 by 20 feet for Government stock, C. W. O. 21609---	97. 62
Build steel racks in steel stock room, C. W. O. 8318-----	519. 38
Trolley system for handling bar steel, C. W. O. 14929-----	84. 19
Build shelter over stock rack, C. W. O. 15992-----	322. 03
Build storage shed for Government scrap, C. W. O. 21402-----	83. 80
Build additional shed for Government scrap, C. W. O. 21693-----	343. 30
Build covering over top of inspection office, C. W. O. 20717-----	31. 89
Build inspection and assembly room, C. W. O. 20705-----	698. 17
Build addition to Government accounting office, third floor, C. W. O. 20705-----	113. 47
Build addition to ordnance office, first floor, C. W. O. 24424-----	229. 17
Build office for Government accountant 20 by 20 feet on third floor, C. W. O. 24496-----	564. 32
Heat in ordnance office, first floor, C. W. O. 21642-----	269. 27
Build shed over cold saws south of building 17, C. W. O. 21625-----	994. 34
1 set apothecary scales, 5 pound capacity, C. W. O. 8341-----	16. 93
1 set apothecary scales, 5 pound capacity, C. W. O. 8342-----	17. 09
3 hard-seat revolving chairs, C. W. O. 8336-----	27. 68
6 hard-seat revolving chairs, C. W. O. 14915-----	55. 38
1 60 by 32 inch flat-top desk with two chairs, C. W. O. 14900-----	61. 25
1 72 by 36 oak table, C. W. O. 20638-----	30. 00
1 60 by 34 by 30 inch flat table, C. W. O. 20639-----	34. 20
1 G-582 revolving chair, C. W. O. 20639-----	9. 00
1 B/P cabinet, C. W. O. 15994-----	46. 57
3 flat-top desks, 1 typewriter desk, 4 office chairs, C. W. O. 21411-----	207. 10
1 electric fan, C. W. O. 21614-----	25. 00
1 ten bank key comptometer, C. W. O. 21623-----	300. 00
1 No. 3, 18-inch Underwood typewriter No. 58761, C. W. O. 21627-----	107. 33
1 60 by 60 by 30 flat-top desk, C. W. O. 21698-----	39. 50
1 6-drawer sanitary typewriter desk, C. W. O. 21698-----	40. 50
1 swivel arm chair, C. W. O. 21698-----	13. 50
1 No. 3, 14-inch No. 147882 Underwood typewriter, C. W. O. 25126-----	75. 00
2 60 by 32 by 30 flat-top desks, office desks, C. W. O. 25098-----	88. 00
2 swivel chairs, C. W. O. 25098-----	34. 00
Install 15 marolites in inspection room, C. W. O. 24500-----	271. 90
2 No. 1067 arm chairs, C. W. O. 30793-----	28. 50
1 No. 71 typewriter stand, C. W. O. 30793-----	10. 00
Make inspection benches, C. W. O. 21650-----	26. 59
Install 60-inch old bench in adapter department, C. W. O. 21407-----	49. 45
1 No. 338, 55 by 30-inch typewriter desk, C. W. O. 14900-----	85. 00
1 table and hood for hardening gears (T-16), C. W. O. 24449-----	187. 05
Install two small furnaces for heating adapter shells for lacquering, C. W. O. 21629-----	170. 85

CHALMERS PLANT.

3. The following items were supplied at the request of Capt. Norris W. Osborn:

1 portable jib crane for unloading steel out of cars, C. W. O. 18062---	\$148. 04
Install lights for new loading dock to creek for testing motor vehicles at night, C. W. O. 17978-----	1, 147. 47
Office for Army inspector, third floor, building 4, C. W. O. 5915-----	370. 92
Obsolete stock room, second floor, building 4, C. W. O. 18233-----	822. 70
Partition off space in Mr. Ott's office used for Lieut. Gfrorer, C. W. O. 18214, first floor, building 2-----	221. 43
Build office in building 2, first floor, for Army office, C. W. O. 5935---	94. 97
Inclose second bay of building 5 for storing Government equipment, C. W. O. 18121-----	182. 83

Rearranging north end of building 2, first floor, and second floor to move factory accounting department to second floor, C. W. O. 17926	\$4,544.48
Extension to office, second floor, building 2, C. W. O. 18995	640.15
Office for Government accountants in building 1, second floor, C. W. O. 5999	374.24
Government stock office, second floor, building 3, C. W. O. 18911	195.17
Extend partition and make private office for Lieut. Batchelder and floor building 2, C. W. O. 18938	397.06
Miscellaneous pipes and fittings for toilets	1,580.10
Bins for tools, third floor, building 4 for Government work, C. W. O. 4967	235.30
Extension to steel rack for Government steel building 31, C. W. O. 18057	375.89
6 racks with partitions for Government, B/P, C. W. O. 5984	62.22
1 rack for holding Government steel 31 feet long in building 31, C. W. O. 18253	220.38
Rack for micrometers for Government tool crib, third floor building 4, C. W. O. 18342	31.59
5 bins for rough casting, put aside between 3 and 4, C. W. O. 18465	145.09
6 steel trays on rollers for tractor final assembly, C. W. O. 18484	175.31
5 steering-clutch shaft racks for tractor stock room, C. W. O. 18535	199.73
New shelves for gauges in Government tool crib, second floor, building 4, C. W. O. 18495	56.54
10 horses for assembling first floor, building 2, C. W. O. 18507	33.35
25 boxes, 25 by 25 inches, with four compartments for Government stock room, C. W. O. 18554	22.69
Installing electrical fan in Government inspector's office, third floor, building 4, C. W. O. 18334	139.30
Four cushions for Mr. Spreen's office, C. W. O. 18626	5.49
Stock bin for block test, C. W. O. 18624	109.48
1 cabinet, 39 by 18 by 23½ inches, with 9 shelves for Government cost books, C. W. O. 18648	41.21
Rack in Government tool crib for broaches, C. W. O. 18178	16.19
10 intermediate shaft racks for stock room, building 2, third floor, C. W. O. 18536	14.14
10 countershaft racks for use in stock room, third floor, building 2, C. W. O. 18537	21.48
1 desk, 6 feet long, with two drawers and cupboard on top, for inspection department, C. W. O. 18723	71.91
1 No. 126 oak desk and 1 No. 19 oak chair, C. W. O. 18007	48.38
1 No. 3 14-inch No. 222795 Underwood typewriter, C. W. O. 18007	91.13
5 No. 330 mahogany arm chairs, C. W. O. 18007	45.00
2 No. 2020½ oak swivel "Taylor" chairs, C. W. O. 18007	33.12
1 No. B550 light oak Jasper stenographer's desk, C. W. O. 18007	36.68
6 R Eclipse inkwells, C. W. O. 18007	5.00
3 round small double-case plates, C. W. O. 18007	2.50
2 No. 330 oak arm chairs, C. W. O. 18007	17.00
1 No. 2002 oak leg chairs, C. W. O. 18007	7.50
1 No. 321 oak, 72 by 36 inch table, C. W. O. 18007	26.60
3 brass cuspidors, C. W. O. 18007	3.75
1 No. C250, 50-inch light oak stenographer's desk, C. W. O. 18007	29.25
1 No. 283, 50-inch Murphy stenographer's chair, C. W. O. 18007	6.75
2 60-inch oak desks, at \$34 each, C. W. O. 18007	68.00
1 No. 3, 12-inch No. 224361P Underwood typewriter, C. W. O. 18007	87.08
1 3½-inch oxidized costumer, C. W. O. 18007	6.17
2 28-51 tables, at \$16.75 each, less 10 per cent, C. W. O. 18007	30.15
1 flat-top desk, No. 377; 2 chairs, No. 2001½, Lieut. Buehler's office	91.98
1 stenographer's chair, Lieut. Buehler's office	8.00
1 60-inch flat-top desk, for Private Good's office	30.00
1 desk chair, for Private Good's office	6.50
1 straight back chair, for Private Good's office	6.00
1 clothes tree for Private Good's office	3.50
12 No. 57 wood stools, 30 inches high; 1 flat-top office desk, C-160; and 1 No. 250 swivel arm chair, for United States Inspection	57.90
1 Triumph punch, for Government order department	2.00
1 typewriter desk, oak, for Lieut. Osborn's office	38.00

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1 typewriter chair, for Lieut. Osborn's office-----	\$7. 50
5 oak flat-top desks, 32 by 60, for accounting department; 5 oak swivel chairs without arms, for accounting department-----	324. 45
1 oak flat-top desk, No. 0360 and 1 oak swivel chair without arms, for Lieut. Osborn's office-----	49. 95
1 typewriter desk No. 0250 for production office, Ordnance Department building No. 2, first floor, and 1 chair for same, No. 19-----	43. 42
1 double pedestal oak typewriter desk and 1 oak typewriter desk chair for Lieut. Osborn-----	45. 50
1 oak desk 34 by 60, for Lieut. Gfrorer, Production Division building No. 2-----	45. 00
1 oak swivel chair for Lieut. Gfrorer, Production Division building No. 2-----	10. 00
2 plain chairs without arms, for Lieut. Gfrorer, Production Division building No. 2-----	10. 00
1 No. 5, 10-inch Underwood typewriter, Elite type, for office of Mr. Bendel, Government accountant-----	83. 03
1 No. 3, 12-inch Underwood typewriter, Pica type, for Lieut. Osborn's office-----	87. 08
2 12-inch Pica type Underwood typewriters, \$87.08 each, for Army inspector of ordnance office-----	174. 16
1 combination filing cabinet-----	113. 62
1 typewriter desk No. 20 and 1 typewriter chair No. 19 (for Government office building No. 1, second floor)-----	40. 95
2 sets metal book ends, at 25 cents pair-----	. 50
1 typewriter desk, at \$27.50, less 10 per cent, for Lieut. Gfrorer's office	24.75
1 double pedestal oak desk, flat top; 1 swivel chair for same, oak No. 636; 1 four-drawer steel filing cabinet with lock; 1 double pedestal oak stenographer's desk No. 20; 1 oak stenographer's chair for same No. 16 W, for Government accounting department, Mr. Bendal's office-----	128. 16
1 flat-top oak desk, 34 by 60, at \$45; 1 oak swivel chair for same, at \$11, for Lieut. Gfrorer, building No. 2, second floor, production office--	56. 00
1 4-drawer Shaw-Walker steel cabinet with lock, for Government accounting department-----	47. 25
1 oak flat-top desk, 34 by 60, \$45; 1 desk chair swivel without arms, \$11; 2 plain chairs, \$5 each-----	66.00
3 Shaw-Walker filing cabinets, Government purchasing department--	117. 45
2 oak flat-top desks No. 953 and 2 oak chairs, swivel, No. 807½, for Government office building No. 1, second floor-----	121. 05
1 No. 50, 3 by 5, card cabinet; 1 No. 55, 5 by 8, card cabinet; 1 No. 60 letter unit-----	46. 35

4. The following items were supplied at the request of first Lieut. B. M. Lasley:

Move partition one bay south of Government drafting room, second floor, building No. 1-----	\$1,046.74
Office for Capt. Lasley, second floor, building No. 1, C. W. O. 4536--	193. 39
Government drafting room, second floor, building No. 1, C. W. O. 18271	231. 43
Rearranging south end of building No. 1 of first floor for exclusive use of Government experimental, C. W. O. 5184-----	5,351. 53
One steel rack, 32 feet long, in building No. 1, for tractor steel, C. W. O. 18339-----	474. 93
1 2108, 66 B. M. desk, C. W. O. 18007-----	57. 15
1 794, N. M. chair, C. W. O. 18007-----	14. 85
1 No. 207 B. M. wardrobe, C. W. O. 18007-----	30. 00
8 No. 2275, 42 by 60 inch drawing boards; 8 No. 2291 pairs horses, 6 T squares, and 8 drawing stools, C. W. O. 18007-----	249. 50
1 No. 3, 14-inch No. 222628 Underwood typewriter, C. W. O. 18007----	91. 13
3 brass cuspidors, \$1.25 each, C. W. O. 18007-----	3. 75
2 No. 13 chairs, C. W. O. 18007-----	15. 30
2 Boston pencil sharpeners for Lieut. Lasley's office, at \$1 each-----	2. 00
1 B 550 L. oak stenographer's desk, C. W. O. 18007-----	36. 68
1 Mahogany finish steel letter file, C. W. O. 18007-----	51. 75

DAYTON PLANT.

5. The following items were supplied at the request of Mr. Louis J. Horowitz, Assistant Chief of Ordnance:

Addition to building D, not completed (concrete foundation only), C. W. O. 15338-----	\$8,449.39
Addition to building A, not completed, C. W. O. 15341-----	8,988.95

6. The following items were supplied at the request of Capt. Albert G. F. Buehler:

Build office for ordnance inspector, C. W. O. 14959-----	\$378.70
Build Government inspection office in motor assembly, C. W. O. 14964-----	103.68
Build shed roof on east side of axle assembly to store Government stock, C. W. O. 14976-----	301.93
Build Government scrap shed, C. W. O. 14994-----	123.23
Build office for Government auditor, C. W. O. 14963-----	169.47
Enclose salvage inspection room north of building M to make room for Government work, C. W. O. 15051-----	218.86
Steel stock rack for structural steel department, C. W. O. 14950-----	48.91
Temporary shed roof over grease barrels, 18 by 72 (Government stor- age), C. W. O. 15088-----	53.22
Build scrap shed for inspection department 22 by 15 feet for Gov- ernment scrap, C. W. O. 15099-----	108.21
Build shed roof at east end of building B, 17 by 16 feet, for storing tractor stock, C. W. O. 15100-----	338.68
Temporary shed over steel stock on platform, C. W. O. 15089-----	57.80
1 bin for storing Government stock, C. W. O. 15167-----	263.29
Bench and assembly racks to be used on tractor assembly, C. W. O. 15045-----	791.79
Install air line in building D for tractor assembly, C. W. O. 15079---	409.77
3 benches for motor inspection department for Government, C. W. O. 15142-----	120.17
Build office for Government auditor, C. W. O. 15145-----	659.56
1 bin for Government stock room for storing Government stock, C. W. O. 15168-----	242.39
3 benches, 26 by 26 inches, in motor machine shop, Government, C. W. O. 15176-----	26.20
12 assembly racks to be used on 6-ton tractor, C. W. O. 15214-----	16.07
Build three trucks for assembly room, C. W. O. 15231-----	9.24
Build bins for Government stock building M, C. W. O. 15228-----	842.36
10 bucks for assembly Buda motors, C. W. O. 15232-----	68.70
Inspection room for Government parts in machine shop, C. W. O. 15249-----	190.25
1 oak costumer, No. 361, C. W. O. 14954-----	5.14
1 oak desk S-16, C. W. O. 14954-----	38.22
1 oak chair, No. 5207, C. W. O. 14954-----	10.58
1 W. L. oak chair, No. 152, C. W. O. 14954-----	10.14
1 oak desk, C-160, C. W. O. 14954-----	27.78
1 S-63 desk, T-3177, C. W. O. 15124-----	40.50
1 colonial chair, T-3178, C. W. O. 15124-----	10.80
1 No. 1400 letter crib T-3179, C. W. O. 15124-----	11.25

7. The following items were supplied at the request of Capt. J. B. Budd:

Build office for Lieut. Budd, C. W. O. 14974-----	\$580.69
Office for Capt. Budd, C. W. O. 15233-----	543.52
Addition to office for Capt. Budd, C. W. O. 15233-----	121.60
1 oak desk No. S-63½, purchased from Buntell-Roth Co., C. W. O. 14954 (P. O. 215152)-----	38.22
2 swivel chairs, No. 1417½, C. W. O. 14954-----	34.80
1 oak desk No. 63½ (P. O. 210538), C. W. O. 14954-----	38.22
1 No. 624 oak chair, T-3140, C. W. O. 14954-----	11.00

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1 No. 361 oak costumer, T-3186, C. W. O. 14954.....	\$5. 50
1 No. 422 steel filing cabinet, T-3364, C. W. O. 14954.....	46. 50
1 S-6 typewriter oak desk, T-3185, C. W. O. 14954.....	42. 00
1M-60 oak table, 30 by 60, T-3001, C. W. O. 14954.....	13. 50
2 No. 453 bentwood oak chairs, T-3359-3360, C. W. O.....	7. 50
1 No. 360 oak desk, T-3203, C. W. O. 14954.....	52. 20
1 No. 1139½ oak chair, T-3152, C. W. O. 14954.....	15. 98
1 Remington typewriter, No. 10 RL 81815.....	-----

8. The following items were supplied at the request of Capt. Frank M. Seig:

Make necessary changes in Government drafting room, C. W. O. 14968..	\$118. 74
Make 30 inkwell stands for Government use, C. W. O. 14953.....	28. 39
4 desk lamps, No. 8734, Emerolite, C. W. O. 14954.....	39. 20
2 drawing boards, T-3428-3429, C. W. O. 14954.....	42. 20
2 filing cabinets, T-3591-3592, C. W. O. 15124.....	340. 00

DISPOSITION.

The Appeal Section will make and transmit a statement of the nature, terms, and conditions of the agreement and Certificate C to the Ordnance Section for action in accordance herewith.

Lieut. Col. McKeeby and Lieut. Tabb concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

DECEMBER 20, 1920.

Case No. 3032.

In re **CLAIM OF MINNEAPOLIS STEEL & MACHINERY CO.**

- 1. MATERIALS AND PRODUCTION—ACQUISITION OF IN EXCESS OF EXISTING CONTRACTS—GOVERNMENT NEEDS.**—When a contractor while operating under Government contracts acquires material in excess of requirements for those existing contracts, partly in expectation of future contracts and partly because of contractor's voluntary change in the use of materials, the Government, in the absence of a specific agreement, is not bound to reimburse loss caused thereby. Mere urgings and requests by Government agents upon manufacturer to keep a sufficient supply of raw material on hand so as to keep in continuous production and be able to take future orders so long as the production is needed by the Government, without specifying the amount of the material, price, or duration of the need of such production, such urgings and requests are too vague and indefinite to constitute an agreement under the act of March 2, 1919.
- 2. CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$81,562.19 based upon an informal agreement for steel shells.

Capt. Taylor writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case is presented as arising under the act of March 2, 1919, and is for \$94,256.84, arising out of the purchase of high-speed tool steel and stellite by the claimant for use in connection with an alleged informal agreement for the manufacture of 155-millimeter shells. The claimant offers a salvage value of \$12,694.65 for indirect material, leaving a net claim of \$81,562.19.

2. It appears that the claimant company had a contract, No. G-A-164, dated July 16, 1917, with the Ordnance Department, United States Army, for machining 200,000 155-millimeter shells, which was completed in the early summer of 1918. Before the completion of this contract another contract, No. G-648-389-A, for machining 200,000 155-millimeter shells, was awarded the claimant under date of January 31, 1918. This second contract has also been settled and contractor fully paid.

3. On November 1, 1918, when the second contract was about 50 per cent completed, the claimant received a procurement letter for a third contract, No. P-18050-4445-A, for machining 200,000 shells. This letter was signed by Capt. H. S. Garrett, projectile section, Pro-

curement Division, Ordnance Department, United States Army, and on November 12, 1918, a contract was prepared in accordance with the terms of this procurement letter. However, no work was ever done on this contract, and on December 10, 1918, the same was suspended.

4. The claim for \$81,562.19 includes an item of \$5,335.29 for interest on this amount from date of suspension of the last contract.

5. After settlement was made on the first and second contracts and before June 30, 1919, this present claim for indirect material, including drills, cutters, spades, tool steel and stellite, was included in the claims on those two contracts before the Chicago district ordnance board. However, this claim was disallowed in the settlement of these first two contracts, as the material in question could not be allocated to either, it being in excess of the requirements for both the contracts. The claimant then set up this claim as arising out of contract No. P-18050-4445-A, and same was disallowed by the Chicago board and by the Ordnance Section of the War Department Claims Board because the material was purchased long before the date of that order. This last course has been abandoned by the claimant, and it has now presented its claim to the Appeal Section as a class B claim arising out of an alleged informal agreement, which led to the giving of contract No. P-18050-4445-A, on November 1, 1918, under which no work was done and no expenditures made, and was suspended on December 10, 1918.

6. The claimant contends that at the time the first two contracts were given it was asked to take much larger contracts than it did, and that the officers of the Ordnance Department kept urging it to do all possible to take more and larger contracts, and represented to the claimant that it would be given contracts just as fast as it progressed with this work. The demand of the Government for shells was great and urgent, and the officers of the Ordnance Department urged the claimant to do all it could to keep in continuous operation. Claimant further alleges that, as the result of the Government demands and the necessity of anticipating requirements for such materials as are in question, it was necessary to order large quantities far in advance of actual schedules, in order to have same on hand when needed, and that on this basis the claim is a justifiable one.

7. Mr. George M. Gillette, president of the claimant company, testified that when his company got contract No. G-648-389-A, dated January 31, 1918, it was asked to take a contract for 300,000 or 400,000 shells in place of 200,000, but that it could not do it, as that quantity was beyond the limit of the company's capacity. And during the negotiations of this contract and continually throughout the

spring and summer of 1918 he was told by various Government officers, including Capt. H. S. Garrett, that the demand for 155-millimeter shells was very great and that his company would get contracts for the same just as fast and in such quantities as it could possibly produce. And that it was very necessary that claimant keep in continuous production, and the officers kept urging his company to take more and larger orders. Mr. Gillette further testified that during the work on the first contract it found that stellite was better for machining the shells than high-speed tool steel; that it was thereafter used much in place of the tool steel, and that all this material in question was bought long before the receipt of the letter of November 1, 1918, informing the claimant that it was to be given another contract, and therefore it can not be allocated to that contract. He also testified that this material could not be allocated to either of the first two contracts, but was purchased on account of the urgings and representations of the Government officers.

8. Mr. C. A. Olsen, managing agent of the claimant company, in addition to confirming the testimony of Mr. Gillette, testified that the change to the use of stellite in place of tool steel was made voluntarily by the claimant after all this tool steel had been ordered, and that perhaps some of this steel left on hand was due to the claimant's change to the use of stellite.

9. It appears that the claimant company was a large producer of the 155-millimeter shells and practically the entire capacity of its plant was devoted to machining shells, although it also had contracts for gun carriages, hoisting engines, and was engaged in a small amount of commercial work. High-speed tool steel was used in the machining of shells, and in view of the contracts which the claimant had and those which it expected to receive from the Government it provided itself with large quantities of this material, the purchase of which was made during the life of the two contracts and several months before the claimant was notified on November 1, 1918, that it was to receive another contract. Orders for most of the tool steel were placed in March 1918, while work on the first contract was in process. Mr. Gillette testified that the claimant had not expected to use this material before the early part of 1919; however, it was purchased from six months to a year prior to that time.

10. It does not appear that any Government representative instructed the claimant to purchase any of this material in excess of that necessary to complete the contracts which it then had, nor does it appear that any Government agent specified the material, price, or duration of any future orders, except the claimant was told that the demand was very great, and that it would get all the contracts that it could possibly fill, as long as the war lasted.

DECISION.

1. It can not be said that any of this material in question was purchased specifically for the contract which the claimant received on November 1, 1918, under which no work was ever done, as the material was all purchased months before November 1, 1918, the claimant does not contend that the material was purchased for either of the prior contracts. Furthermore, the same was in excess of that required for the fulfillment of those contracts.

2. Therefore it seems that the only question to be decided is whether there was an informal agreement entered into by the claimant and the Government during the negotiations between agents of the claimant, principally Mr. Gillette, and the Government agents in 1917 and 1918, whereby the Government agreed to save harmless the claimant in purchasing material in excess of that required to fill the contracts which it then had, and in anticipation of future orders from the Government. The claimant contends that there was such an agreement on account of which it purchased this material in question, and on account of which it is now asking reimbursement.

3. It is the opinion of the Appeal Section that there was no such agreement entered into. It does not appear that any Government representative instructed the claimant to purchase any of this material in excess of that necessary to complete its then contracts, or that the Government would save the claimant harmless in the purchase of same. Nor does it appear that any Government agent specified the material, price, or duration of the future orders, except the contractor was told that the Government's demand for 155-millimeter shells was very great and that it would get contracts just as fast as it was able to fulfill same and just as long as the war lasted. It is true that the claimant was very desirous of producing as many shells as possible for the Government and that the Government was equally desirous that its demands for shells be satisfied. But clearly the purchase of this excess material before the claimant was informed that it would receive another contract was—in the absence of authorization from some Government agent to do so—merely a business risk which the claimant assumed in its desire to be ready to take future contracts which it anticipated the Government would give. After all this tool steel had been ordered and during the life of the first two contracts, the claimant voluntarily changed from the use of this tool steel to stellite, because it was found to give much better results, and it is due to this change that a large part of the tool steel was left on claimant's hands. Clearly under these circumstances the Government can not be held responsible for such purchases.

4. The evidence as to any statement made by Government agents as to the extent of future orders for shells or as to the procurement

of raw materials by the claimant in anticipation of future orders is indefinite and uncertain. No direct statements were made, and the claimant does not allege that there were any direct statements made, by the Government agents requesting claimant to procure this material or that the Government would reimburse it for same.

5. The Board of Contract Adjustment and the Appeal Section have repeatedly held that mere urgings and requests by Government agents upon manufacturers to keep a sufficient supply of raw material on hand so as to keep in continuous production and be able to take future orders as long as the production was needed by the Government and as long as the war lasted, but without specifying the amount of the material, price, or duration of the need of their production, such urgings are too vague and indefinite to constitute an agreement under the act of March 2, 1919; therefore it is the opinion of this section that the statements made by the Government agents to the claimant in this case did not constitute an agreement.

6. For the reason stated the relief prayed for is hereby denied.

DISPOSITION.

1. This section will enter an order denying relief.

Lieut. Col. McKeeby and Lieut. Hendon concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

DECEMBER 21, 1920.

Case No. 3030.

In re **CLAIM OF L. K. COMSTOCK & CO.**

- 1. OVERHEAD EXPENSE—COST OF THE WORK.**—A subcontractor under a standard cost-plus contract of the Construction Division terminated in accordance with the contract is not entitled to reimbursement as a part of the cost of the work for overhead expense in preparing to perform contract.

Maj. Hill writing the opinion of the Board.

This claim is before this section under General Order 1023, for \$1,337.20, on appeal from a disallowance by the Chief, Construction Service.

FINDINGS OF FACT.

1. The Air Nitrates Corporation had a contract with the Construction Division, dated June 8, 1918, for the construction of United States Nitrate Plant No. 3, Toledo, Ohio. This contract was the usual Construction Division "contract for emergency work." A subcontract was entered into between the Air Nitrates Corporation and the Bates & Rogers Construction Co. for certain work in connection with the building of the plant. The Bates & Rogers Construction Co. entered into a subcontract, dated October 10, 1918, with claimant by the terms of which claimant agreed to do certain electrical work in connection with the erection of the plant. This contract was approved by the Air Nitrates Corporation. All of these contracts were upon the cost-plus basis. The contracts were terminated in accordance with the termination clause shortly after claimant commenced work.

2. The contract of October 10 provided that except as therein modified all the terms and conditions named in the "Contract for emergency work," Construction Division of the United States Army, fourth edition, should apply.

3. Claimant seeks \$1,337.20 as compensation from the Government to cover a part of the overhead expense incurred in assembling and placing their organizations in the field and starting the work. Claimant admits that it had received its fee based upon the amount of work completed at the plant. Claimant states that had the contract proceeded to completion and the fee paid as per terms of the contract it would have absorbed such overhead charges in the fee, but that owing to the fact that the work was ordered terminated

within a few weeks after starting, the fee received, being based only on actual expenditures, was in no measure sufficient to cover the actual expense. Claimant stated that it was unable to detail all of these items of overhead cost, but presented itemized statements covering the time of certain individuals aggregating the amount claimed.

4. Article III of the fourth edition emergency contract reads as follows:

"ARTICLE III—*Determination of fee.*—As full compensation for the services of the contractor, including profit and all general overhead expense, except as herein specifically provided, the contracting officer shall pay to the contractor in the manner hereinafter prescribed a fee to be determined at the time of completion of the work from the following schedule, except as hereinafter otherwise provided."

This section was amended by paragraph 4 of the contract of October 10 in part as follows:

"4. In place of the schedule of percentages contained in Article III of said emergency contract said article is modified so as to provide as follows: As full compensation for the services of the electrical contractor, including profit and all general expense, except as in the emergency contract specifically provided, the construction company shall pay to the electrical contractor a fee of five per centum (5%) upon the cost of the work."

5. Article VIII of the fourth edition emergency contract was not altered by the contract of October 10, and reads in part as follows:

"*Abandonment of work by contracting officer.*—If conditions should arise which in the opinion of the contracting officer make it advisable or necessary to cease work under this contract, the contracting officer may abandon the work and terminate this contract. In such case the contracting officer shall assume and become liable for all such obligations, commitments, and unliquidated claims as the contractor may have theretofore, in good faith, undertaken or incurred in connection with said work; * * *. The contracting officer shall pay to the contractor such an amount of money on account on the unpaid balance of the cost of the work and of the fee as will result in the contractor receiving full reimbursement for the cost of the work up to the time of such abandonment, plus a fee to be computed in the following manner: To the cost of the work up to the time of such abandonment shall be added the amount of the contractual obligations or commitments assumed by the contracting officer, and such total shall be treated as the cost of the work, upon which the fee shall be computed in accordance with the provisions of Article III hereof. * * *"

DECISION.

1. Claimant entered upon this contract with the knowledge that its only recompense was to be the fee based upon cost of the work and that the contract might at any time be terminated.

2. The clause in the article as to abandonment of the work, article 8, "as will result in the contractor receiving full reimbursement for the cost of the work," is one of limitation, and the contractor will not be reimbursed for any item not included in the cost of the work. Claimant admits that if the contract had gone to completion, the overhead claimed would not have been included in the cost of the work, but that claimant would have compensated itself for this expense out of the fee received based on the cost of the work.

3. The item claimed is not one for which claimant is entitled to payment under the terms of its contract, and it has been properly disallowed.

DISPOSITION.

The Appeal Section transmits its decision to the Chief, Construction Service.

Lieut. Col. McKeeby concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

DECEMBER 21, 1920.

Case No. 3010.

In re CLAIM OF PENNSYLVANIA RAILROAD CO.

1. **IMPLIED AGREEMENT.**—Where Government officer requests certain repair work to be done on Government property and the repairs are done an implied agreement arises obligating the United States to reimburse claimant the actual cost and expenses of labor and materials furnished in making the repairs.
2. **SAME.**—Where Government officer requests that workmen's train service be extended from station on the main line of a railroad to Government proving grounds for the benefit of Government employees, and in accordance with such request the train service is so extended over the tracks of the proving grounds, an implied agreement arises obligating the United States to reimburse the fair and reasonable value of such service for the period of time the service was rendered.

Maj. Blackburn writing the opinion of the Board.

FINDINGS OF FACT.

The Appeal Section finds the following to be the facts:

1. This claim arises under the act of March 2, 1919. Statement of claim, Form B, has been filed in accordance with Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$10,990.09 by reason of an agreement alleged to have been entered into between claimant and the United States. The claim was originally filed with the claims board, Transportation Service, Washington, D. C., June 27, 1919, and was dismissed by that board, May 11, 1920, for the reason as stated in the order of dismissal that—

“It appears that the said claim is en train for payment upon completion of certain proof required by the said transportation officer, Aberdeen Proving Grounds, Md.”

The file was transmitted to the Appeal Section for the purpose of determining whether or not an agreement existed. A hearing has been conducted by this section at which claimant and its counsel were present.

2. The circumstances under which the claim arises are as follows: The claim may properly be divided into two items, to wit.,

- | | |
|---|--------------|
| (a) Repairs to Aberdeen Proving Grounds' engine No. 5----- | \$2, 436. 09 |
| (b) Cost of operation of trains and use of railroad equipment from
Aberdeen Station, Md., to and over Aberdeen Proving Grounds
tracks, from Dec. 20, 1917 to July 15, 1920----- | 8, 554. 00 |

Item (a).

3. The following telegram was sent claimant by Maj. Odell.

ARMY PROVING GROUND,
Aberdeen, Md., August 25, 1918.

GAMBLE LATROBE, General Superintendent P. R. R., Wilmington, Del.:

We have small passenger engine needing new flues which we have on hand. May we send engine and flues to Wilmington shop for this and other necessary repairs and when?

J. C. ODELL,
Q. M. C., U. S. A., Inland Traffic Service.

The following telegram was also sent by Maj. Odell:

ARMY PROVING GROUND,
Aberdeen, Md., October 15, 1918.

JAMES BUCKELEW,
*Superintendent Pennsylvania Railroad,
Wilmington, Del.*

Request that proving-ground engine No. 5 now at Wilmington shops for repairs be painted. Wire if this will be done, and approximate date can be returned here.

J. C. ODELL.

4. On September 10, 1918, claimant's superintendent of motive power wrote Maj. Odell that authority had been given to make the necessary repairs to the engine at the Wilmington shop of claimant. The engine was received at claimant's Wilmington shop on October 14, 1918, and was repaired in accordance with the above telegrams, the number of the engine being changed from No. 5 to No. 12. The following items of charges were rendered in doing the repairs:

Labor-----	\$1, 136. 89
Material-----	1, 306. 02
	<hr/> 2, 442. 91
Credit scrap material removed-----	25. 38
	<hr/> 2,417. 53
2,000 pounds of coal-----	4. 87
1 tank of water-----	. 50
Engine-house expenses-----	6.09
Wages of enginemen-----	7. 10
	<hr/> 2, 436. 09

The undisputed testimony is to the effect that the above charges are true, accurate, correct, and reasonable, and were for the actual labor performed on and materials furnished for the engine, and contained no element of profits whatever. The overhauling of the engine was completed on October 31, 1918, and the engine was delivered to and accepted by the United States. Claimant has never received payment for this repair work.

Item (b).

5. In the fall of 1917 the Maryland Dredging & Contracting Co. was doing certain construction work for the Government at Aber-

deen Proving Grounds, Aberdeen, Md., under a cost-plus contract. The officer in charge of construction at Aberdeen Proving Grounds and the superintendent of the Maryland Dredging & Contracting Co., through W. L. Hardy, business administrator of the Maryland Dredging & Contracting Co., on or about November 1, 1917, requested of Mr. James Buckelew, superintendent of claimant at Wilmington, Del., by telephone that the services of the workmen's train which was being operated from Baltimore to Aberdeen Station and return be extended over the proving grounds tracks direct into the proving grounds to facilitate the handling of the workmen and to relieve congestion at Aberdeen. This telephone conversation was subsequently ratified and confirmed by Mr. Hardy by letter to Mr. Buckelew of date August 9, 1919. The previous arrangement with claimant called for the operation of these trains from Baltimore to Aberdeen Station, a station on the line of claimant company. In this connection Mr. Albert W. Hoguet testified that—

“Originally the men unloaded at that point and walked in to the plant where they were employed; but, on account of the long walk and the fact that it took them some time to get there, and that they were not in good physical condition to commence work immediately, the officer in charge, the commanding officer, requested that some arrangement be made for running this train into the proving grounds as far as the track was built at that time; and on the basis of this request through Mr. Hardy such arrangement was made. Eventually the train was run to the end of the track in the proving grounds. As fast as it was completed they ran that train so extended until the whole thing was completed, and then the running of the train over the Government tracks was from Aberdeen to the proving grounds terminal.”

He further testified that the services were begun by claimant on December 20, 1917, and were continued up to July 15, 1920.

6. Claimant amended this item of its claim so as to show a summary of charges as follows:

Bill No.	Date.	Amount.	Train movements—Service.
131/5607.....	Apr. 1, 1919	\$4,530.00	Dec. 20, 1917 to Jan. 31, 1919
131/5606.....	Mar. 28, 1919	204.00	Feb. 1, 1919 to Feb. 28, 1919
131/5722.....	June 18, 1919	694.00	Mar. 1, 1919 to May 31, 1919
131/5735.....	July 7, 1919	257.00	June 1, 1919 to June 30, 1919
131/5771.....	Aug. 5, 1919	260.00	July 1, 1919 to June 31, 1919
131/5808.....	Sept. 4, 1919	243.50	Aug. 1, 1919 to Aug. 31, 1919
131/5857.....	Oct. 7, 1919	241.50	Sept. 1, 1919 to Sept. 30, 1919
131/5898.....	Nov. 4, 1919	253.00	Oct. 1, 1919 to Oct. 31, 1919
131/5939.....	Dec. 4, 1919	225.00	Nov. 1, 1919 to Nov. 30, 1919
131/5991.....	Jan. 5, 1920	232.50	Dec. 1, 1919 to Dec. 31, 1919
131/6131.....	Mar. 4, 1920	450.00	Jan. 1, 1920 to Feb. 29, 1920
131/6186.....	Apr. 2, 1920	247.00	Mar. 1, 1920 to Mar. 31, 1920
131/6237.....	May 3, 1920	238.00	Apr. 1, 1920 to Apr. 30, 1920
131/6284.....	June 2, 1920	202.50	May 1, 1920 to May 31, 1920
131/6351.....	July 26, 1920	195.50	June 1, 1920 to June 30, 1920
131/6417.....	Aug. 17, 1920	80.50	July 1, 1920 to July 15, 1920
Total.....		8,554.00	

The undisputed evidence is that the services for which these charges are made were rendered and the Government received the benefit of same, and that the charges are true and correct, fair and reasonable, and are still unpaid, the testimony being that \$5 per day for the engine and crew for each round trip into the proving grounds, and 50 cents per car per day for each passenger car necessary to accommodate the workmen, were fair and reasonable charges. The fares paid by the workmen and employees were for transportation between Baltimore and Aberdeen Station, where they alighted from the train originally; the arrangement for taking them into the proving grounds was extra service. Subsequently, on or about October 15, 1918, the Government took over and completed the construction work originally undertaken by the Maryland Dredging & Contracting Co. and assumed all obligations of that company.

7. Under date of July 10, 1920, H. W. Schull, Major C. A. C., commanding officer at Aberdeen Proving Grounds, wrote a letter to Mr. James Buckelew, superintendent of claimant, the first paragraph of which reads as follows:

"In view of the fact that a very large reduction in the personnel of the proving grounds has taken place, the matter of the contract for the operation of the work train from Baltimore has been reconsidered, and the amount of traffic in the future between this proving ground and Baltimore, Md., will not warrant the operation of this train between the Pennsylvania station at Aberdeen and the proving ground after July 15. It is, therefore, requested that the services from the Pennsylvania station at Aberdeen to the main part of the proving ground be discontinued after that date."

8. Under date of July 2, 1920, Maj. Schull addressed a letter to the Ordnance Office, technical staff, Washington, D. C., paragraphs 1 and 4 of which read as follows:

"1. Your attention is invited to the fact that the Pennsylvania Railway Co. from December 20, 1917, until July 15, 1920, operated a passenger train between the railway station in Aberdeen, Md., and the several stations at the Aberdeen Proving Ground for the purpose of transporting employees of this proving ground to and from their work. This service was discontinued on account of reduction in personnel under instructions from this office July 15, 1920. No payment for any of these services has so far been made to the railway company by the United States.

* * * * *

4. As stated in paragraph 1 of this letter, no payments to the railway company on account of services rendered have as yet been made by this office. The total amount due to date has not been finally determined, for the reason that bills since March 31 have not as yet been rendered by the railway company. It is believed, however, that the total amount due will not exceed \$10,000. Sufficient funds have been reserved against proving ground facilities and proving

grounds Army to settle these bills when they shall have been audited and allowed."

9. Maj. R. S. Oberly, Ordnance Department, who served as executive officer at Aberdeen Proving Grounds, stated in an affidavit filed in this case, of date October 30, 1920, among other things the following:

"2. The Maryland Dredging & Contracting Co. constructed the railroad from the town of Aberdeen to the Aberdeen Proving Ground, as well as other construction work. A man by the name of Harding, an employee of the Maryland Dredging & Contracting Co., who was in charge of all traffic matter for that company, verbally instructed the local representative of the Pennsylvania Railroad Co. to run their workmen's train to the end of the Government tracks as construction proceeded. This eventually resulted in the train passing through the Government reservation to the last firing range, which was located in the vicinity of Mulberry Point, a distance of approximately 6 miles from the town of Aberdeen, where the train left the Pennsylvania Railroad Co. tracks.

"3. To my knowledge there was never a written agreement between the Government or its authorized agent and the Pennsylvania Railroad Co. setting forth any money consideration for running the trains over the Government tracks.

"4. Some time in the early part of the year 1919, the Pennsylvania Railroad Co. presented a bill for this service, which was brought to my attention as executive officer of the Aberdeen Proving Ground, and which I refused to approve on the ground that no contract was in existence covering this service.

"5. The Maryland Dredging & Contracting Co. was an agent of the Government in matters pertaining to construction work and as such gave verbal orders to the Pennsylvania Railroad Co. to run their workmen's train over the Government tracks. Under Article VIII of the contract between the Maryland Dredging & Contracting Co. and the Government, the Government assumed all obligations entered into by said company in good faith. The service was continued after December 15, 1918, the date upon which the Government took over all obligations of the Maryland Dredging & Contracting Co. and when invoice for this service was rendered by the Pennsylvania Railroad Co. payment was suspended.

"6. The service was actually performed in a satisfactory manner. The main question at issue is whether the Government should pay the Pennsylvania Railroad Co. for running the train over the Government tracks. The fare paid for each person carried from Baltimore to the Aberdeen Proving Ground covered only his fare to the town of Aberdeen on the Pennsylvania line. In other words, the Pennsylvania Railroad Co. did not collect from the passenger for passage over the Government tracks."

DECISION.

1. The Appeal Section, War Department Claims Board, is of the opinion that an implied agreement arose between the United States and the claimant under which the United States became obligated

to reimburse claimant the actual cost and expenses incurred in repairing Aberdeen Proving Grounds' engine No. 5 at its Wilmington, Del., shop in October, 1918.

2. The Board is further of the opinion that an implied agreement arose between claimant and the United States under which the United States became obligated to reimburse claimant the fair and reasonable value of the railroad operation and train service performed by claimant from Aberdeen Station to the Aberdeen Proving Grounds over Government tracks for the benefit of the Government for the period of time beginning December 20, 1917, and ending July 15, 1920.

DISPOSITION.

The Appeal Section, War Department Claims Board, will transmit a copy of this decision, together with a statement of the nature, terms, and conditions of the agreement and certificate Form C, to the Ordnance Section, War Department Claims Board, for appropriate action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Lieut. Col. McKeeby and Capt. Marcum concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

DECEMBER 4, 1920.

Case No. 1705.

***In re* CLAIM OF THE ARTHUR VULCANIZING MACHINE CO.**

The Board of Contract Adjustment rendered a decision in this case on February 10, 1920. On appeal to the Secretary of War it was remanded to the Board for modification. (For statement of facts and decision of February 10, 1920, see Vol. III, these decisions, p. 624.

ON APPEAL BEFORE THE SECRETARY OF WAR.

Upon consideration of the appeal and record in this case I direct that the action of the Board of Contract Adjustment be modified in accordance with the accompanying views of the vice chairman, War Department Claims Board.

NEWTON D. BAKER,
Secretary of War.

MEMORANDUM FOR THE SECRETARY OF WAR.

1. This is a class B claim appealed to the Secretary of War from a decision of the Board of Contract Adjustment awarding claimant the sum of \$2,328.30 for certain tools and spare parts of vulcanizing machines. The claimant contends that it is entitled to the sum of \$2,950.35 for said tools and spare parts.

2. The facts are as follows:

The Board of Contract Adjustment issued certificate Form C on said claim on February 10, 1920, in these words:

"On or about October 26, 1918, the Arthur Vulcanizing Machine Co., of Warren, Ohio, entered into an agreement with the Government, acting through Mr. Robert W. Karla, assistant chief of the shoe and shoe supply section of the Clothing and Equipage Division, Q. M., U. S. Army, under which the claimant agreed to furnish such tools, spare parts, and incidental equipment as might be necessary for the most efficient operation of vulcanizing machines being furnished to the Government by it under procurement order No. L-495-J dated October 16, 1918, for 100 such machines. The Government agreed to pay the claimant the net cost to it of the material which would be so delivered to the Government."

3. The controversy is over the question whether certain heeling forms and foot forms should be paid for at the rate of \$10.80 less 15 per cent and \$3.50 less 15 per cent, respectively, as contractor claims, or whether they should be paid for at the rate of \$7.06 each and \$2.50 each, as the Government claims.

4. That there was an agreement between contractor and the Government is undisputed. This agreement is established by verbal telephonic orders and also by the following:

On January 9, 1919, the zone supply officer at Jeffersonville, Ind., wrote the clothing and equipage division, leather rubber branch, shoe supply section, Quartermaster General's Office, as follows:

"This depot is in receipt of invoice from the above company (the claimant herein) for 30 machines, \$218.63 each; also item for extra parts and tools, \$1,577.41. As no provisions are made for extra parts and tools in the purchase order, information is requested as to whether or not this item for extra parts and tools is correct."

To the above letter the chief shoe supply section, replied by letter dated January 15, 1919:

"This office recommended that contract be prepared for attached list of extra parts, amounting to \$5,735.32. The purchase order has not been issued on this recommendation, due to the fact that it was not completed at the time of the signing of the armistice, but is expected that same will be forwarded for execution as soon as the necessary legislation has been enacted by Congress."

The list referred to in the above letter has the following items and prices, among others:

Three hundred only, \$27 heeling forms complete, at \$10.80 each, less 15 per cent (3 for each vulcanizer.)

Six hundred only, root forms, complete, at \$3.50 each, less 15 per cent (6 for each vulcanizer.)

5. In the testimony taken herein before the Board of Contract Adjustment, it appears that claimant agreed to go out in the market and purchase *tools* and turn them over to the Government *at cost*. These tools were such as were not manufactured by the claimant. The *spare parts*, however, are manufactured by claimant and there is nothing in the testimony to indicate that claimant ever offered or contemplated the sale of such parts at cost. On the contrary there is every proof that claimant offered the spare parts to the Government at \$10.80 and \$3.50 each, with discount as above set forth.

6. It is my opinion that the Board of Contract Adjustment in preparing the certificate Form C and providing that the *tools* and *spare parts* should be paid for *at net cost* was mistaken, and that it was confused by the testimony relative to the purchase of the *tools* at cost.

7. I recommend that the decision of the Board of Contract Adjustment be modified and that the claimant be paid at the rate of \$10.80 each, less 15 per cent, for 195 heeling forms and \$3.50 each, less 15 per cent, for 390 foot forms.

J. A. HULL,
Vice Chairman, War Department Claims Board.

DECEMBER 22, 1920.

Case No. 1705.

In re CLAIM OF ARTHUR VULCANIZING MACHINE CO.

1. **CLAIM AND DECISION.**—A decision in this case was rendered by the Board of Contract Adjustment on February 10, 1920, granting claimant partial relief. On appeal to the Secretary of War this decision was directed to be modified so as to grant claimant full relief and was returned to the Appeal Section, War Department Claims Board, for further consideration. The former decision of the Board of Contract Adjustment has been modified and the entire record transmitted to the Purchase Section, War Department Claims Board, for action in accordance with the decision of the Secretary of War. (For full statement of facts and former decision, see Vol. III, p. 624, these decisions.)

Maj. Blackburn writing the opinion of the Board.

1. By a decision of the Board of Contract Adjustment, dated February 10, 1920 (Vol. 3, Pt. II, p. 286, Decisions of the Board of Contract Adjustment), claimant was granted relief and certificate Form C issued, together with an award. From this decision claimant appealed to the Secretary of War.

2. On December 4, 1920, the Secretary of War made the following decision:

“Upon consideration of the appeal and record in this case, I direct that the action of the Board of Contract Adjustment be modified in accordance with the accompanying views of the vice chairman, War Department Claims Board.”

3. Paragraphs 3, 5, 6, and 7 of the memorandum of the vice chairman, War Department Claims Board, to the Secretary of War, read as follows:

“3. The controversy is over the question whether certain heeling forms and foot forms should be paid for at the rate of \$10.80, less 15%, and \$3.50, less 15%, respectively, as contractor claims, or whether they should be paid for at the rate of \$7.06 each and \$2.50 each, as the Government claims.

* * * * *

“5. In the testimony taken herein before the Board of Contract Adjustment it appears that claimant agreed to go out in the market and purchase *tools* and turn them over to the Government *at cost*. These tools were such as were not manufactured by the claimant. The *spare* parts, however, are manufactured by claimant and there is nothing in the testimony to indicate that claimant ever offered or contemplated the sale of such parts at cost. On the contrary, there

is every proof that claimant offered the spare parts to the Government at \$10.80 and \$3.50 each, with discount as above set forth.

"6. It is my opinion that the Board of Contract Adjustment in preparing the certificate Form C and providing that the *tools* and *spare parts* should be paid for *at net cost* was mistaken, and that it was confused by the testimony relative to the purchase of the *tools* at cost.

"7. I recommend that the decision of the Board of Contract Adjustment be modified and that the claimant be paid at the rate of \$10.80 each, less 15%, for 195 heeling forms and \$3.50 each, less 15%, for 390 foot forms."

4. The record has been returned to the Appeal Section, War Department Claims Board, for further consideration in the light of the decision of the Secretary of War.

DECISION.

Pursuant to the direction of the Secretary of War, as set out in the findings of fact herein, the decision of the Board of Contract Adjustment in this case, of date February 10, 1920, is modified in the manner and as is provided in the decision of the Secretary of War.

DISPOSITION.

The entire record in this case, together with a copy of this decision, will be transmitted to the Purchase Section, War Department Claims Board, for consideration and action, in accordance with the directions of the Secretary of War.

Lieut. Col. McKeeby and Capt. Marcum concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

DECEMBER 22, 1920.

Case No. 2523.

In re **CLAIM OF FRENCH MANUFACTURING CO.**

- 1. COMMITMENTS—SUSPENSION OF CONTRACT.**—A contractor is entitled to losses arising in connection with the purchase of raw material allocated to a Government purchase order issued claimant after the date of claimant's purchase of the raw material if said purchase order comes within the exceptions of section 3744, Revised Statutes.
- 2. CLAIM AND DECISION.**—Claim for \$4,000 arising under General Orders, No. 103, War Department, 1918, in the settlement of a purchase order for \$19,000 to be completed within 60 days, claimant showing a loss due to a commitment on thread yarn. The principal facts are stated in an opinion reported in Volume IV, page 911. On appeal the Secretary of War set aside the previous decision and remanded claim to the Appeal Section, War Department Claims Board, for further proceedings. Held, claimant is entitled to the difference between the market price on date of purchase and market price on date of sale, which was within a reasonable time after suspension of the contract.

Capt. Miller writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim, amounting to \$4,000, was decided by the War Department Board of Contract Adjustment in an opinion adverse to claimant on April 3, 1920, reported in Volume IV, Part II, page 469, whereupon claimant appealed the entire matter to the Secretary of War.
2. On November 17, 1920, the Secretary of War remanded the claim to the Appeal Section, War Department Claims Board, with the following order for further proceedings:

NOVEMBER 17, 1920.

In the matter of the claim of French Manufacturing Company,
Case No. 150-C-2523.

ON APPEAL BEFORE THE SECRETARY OF WAR.

Upon consideration of the record in this matter, it is directed that the decision of the Board of Contract Adjustment be set aside and that further proceedings be had by the Appeal Section, War Department Claims Board, to determine whether or not the action of the Purchase Section was correct.

NEWTON D. BAKER,
Secretary of War.

3. Purchase Order No. 5429-B for 10,000 pounds of 10/3 olive-drab reverse thread, soft finish, at \$1.90 per pound, was issued in favor of claimant by the Quartermaster General's Office under date of October 21, 1918. The total price involved was approximately \$19,000 and deliveries were to be completed November 23, 1918. Work on this purchase order was suspended after the manufacture of 6,970 pounds of thread, leaving a balance of 3,030 pounds not accepted by the Government.

4. On September 11, 1918, claimant placed an order with the Hawthorn Spinning Mills for 25,000 pounds of thread yarn to be used in performing Government contracts. This order was accepted by the Hawthorn Spinning Mills on September 13, 1918. When the purchase order of October 21, 1918, was received, claimant partly performed same from thread yarn on hand, and then allocated to this purchase order from the purchase of September 13, 1918, sufficient thread yarn to complete the manufacture of 3,030 pounds, being the portion which has never been delivered to the Government.

5. The testimony shows that it requires about $1\frac{1}{2}$ pounds of cotton to make 1 pound of thread yarn. In fact, an official audit covering the activities of the Hawthorn Spinning Mills for the period commencing July 1, 1918, and ending December 31, 1918, shows that from 100 per cent of cotton there was manufactured 67.29 per cent thread yarn. It was further shown that in manufacturing thread from thread yarn there develops a loss of about 10 per cent.

6. The Hawthorn Spinning Mills purchased one-half fancy and one-half extra choice sea-island cotton for the production of the 25,000 pounds of thread yarn. The market price of fancy sea-island cotton on September 13, 1918, was 72 cents, the market price on extra choice being about one-half a cent lower. This was 2 cents higher than the quotations for cotton f. o. b. Savannah.

7. The Hawthorn Spinning Mills was first notified by the Government on November 28, 1918, to stop production of thread yarn to be used in Government orders on November 30, 1918. On or about December 16, 1918, this company was notified to sell the cotton purchased for the manufacture of this thread yarn. The record contains many letters written by the Hawthorn Spinning Mills in an effort to dispose of this cotton. The reports of the principal dealers in sea-island cotton for the period from November 30, 1918, to January 15, 1919, show that the market during that time was practically nominal and that very few sales were being made. The Hawthorn Spinning Mills, however, did sell this cotton on January 15, 1918, for $51\frac{1}{2}$ cents per pound. The market price of extra choice sea-island cotton from December 27, 1918, to January 11, 1919, was 52 cents per pound, and fancy sea-island cotton accordingly about $52\frac{1}{2}$ cents per pound. The next quotation that could be found following Janu-

ary 15, 1919, the date of the sale of the cotton, was January 18, 1919, when the price had advanced a few cents.

DECISION.

1. By direction of the Secretary of War as set forth in the foregoing order of November 17, 1920, the decision of the War Department Board of Contract Adjustment dated April 3, 1920, denying relief is hereby vacated and set aside.

2. The claim here presented covers losses alleged to have been incurred in connection with a purchase order, amounting to \$19,000, to be completed within 60 days. This purchase order comes within the exceptions to section 3744, Revised Statutes, as evidenced by regulations of the Quartermaster General's office promulgated in accordance with section 6853b of the Compiled Statutes which provides:

"Hereafter whenever contracts which are not to be performed within sixty days are made on behalf of the Government by the Quartermaster General, or by officers of the Quartermaster Corps authorized to make them, and are in excess of \$500 in amount, such contracts shall be reduced to writing and signed by the contracting parties. In all other cases contracts shall be entered into under such regulations as may be prescribed by the Quartermaster General." (38 Stat., 1078.)

On October 21, 1918, the regulations of the Quartermaster General's office authorized the purchase of thread in an amount less than \$25,000 where delivery is to be made within 60 days on Purchase Orders, Quartermaster Corps Form No. 108B, which form was used in connection with the purchase order of October 21, 1918. Settlement of this purchase order therefore does not come within the act of March 2, 1919, but must be made under the provisions of General Orders No. 103, War Department, 1918.

3. In settling formal contracts, and those contracts coming within the exceptions to section 3744, Revised Statutes, the contractor is not limited to losses arising from expenditures made or obligations incurred subsequent to the date of the contract. It follows, therefore, that claimant should be allowed his loss on sufficient thread yarn to manufacture 3,030 pounds of thread, even though the order for the thread yarn was placed by claimant prior to the receipt of the purchase order of October 21, 1918.

4. There should be allowed claimant the difference between the market price of one-half fancy and one-half extra choice sea-island cotton on September 13, 1918, and the market price of this cotton in the same proportions on January 15, 1919. The market price of fancy sea-island cotton f. o. b. mills on September 13, 1918, was 72 cents, and

the evidence shows that the market price of extra choice would therefore be $71\frac{1}{2}$ cents. The market price of the mixture should then be $71\frac{3}{4}$ cents. The Hawthorn Spinning Mills originally fixed this market price at 73 cents, but later stated that 72 cents would be fair. It appears to the Board, however, that since this cotton was one-half fancy and one-half extra choice, the market price would be $71\frac{3}{4}$ cents f. o. b. mills September 13, 1918. Since the market price of extra choice sea-island cotton was 52 cents on January 15, 1919, a mixture of one-half fancy and one-half extra choice would figure at $52\frac{1}{4}$ cents. Claimant should be allowed the difference between $52\frac{1}{4}$ cents and $71\frac{3}{4}$ cents on sufficient cotton to manufacture 3,030 pounds of thread.

5. In view of the fact that the Hawthorn Spinning Mills produced 67.29 pounds of thread yarn from 100 pounds of cotton during the latter half of the year 1918, the settlement should be figured on the basis that these percentages would have been maintained in manufacturing the thread yarn for this contract. It must be assumed that the French Manufacturing Co. would have lost 10 per cent of the thread yarn in manufacturing the thread. Both operations must be considered in determining the amount due on this claim.

DISPOSITION.

A copy of this decision will be transmitted to the Purchase Section, War Department Claims Board, for appropriate action.

Lieut. Col. McKeeby and Capt. Morgan concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

DECEMBER 23, 1920.

Case No. 3043.

In re **CLAIM OF FITZGERALD CONSTRUCTION CO.**

IMPLIED AGREEMENT.—Where claimant enters into negotiations with constructing quartermaster for the supplying of certain sand and gravel, and afterwards submits to a cost-plus contractor having the construction in charge, a formal bid for supplying the same materials in the same quantity as referred to in the negotiations between the constructing quartermaster and the claimant, which said bid or proposal is accepted by the prime contractor, no agreement thereby results from the negotiations of the claimant with the constructing quartermaster that the Secretary of War is authorized to adjust or settle under the provisions of the act of March 2, 1919.

CANCELLATION OF ORDER.—Where claimant submits a bid to a prime contractor having charge of the construction, specifying a certain date on which deliveries are to begin, which deliveries are necessary for the proper construction of the Government project, and claimant fails to begin delivery on the date specified in the proposal, the prime contractor is justified in canceling the said order, and no agreement, express or implied, is thereby created whereby the United States Government is in anywise bound to reimburse claimant for expenditures made in an effort to place itself in position to make deliveries within the time stated in its proposal to the prime contractor.

ASSIGNMENT OF CONTRACT.—Where a person in his individual capacity enters into a contract for supplying a prime contractor on a Government project with certain sand and gravel and thereafter assigns the said contract to a corporation such assignment precludes the payment of any money by the United States to claimant or his assignee, as such assignment is prohibited by the provisions of section 3737, Revised Statutes.

DELAY IN RECEIPT OF MACHINERY DELIVERED TO THE RAILROAD COMPANY AND CONSIGNED TO CLAIMANT COMPANY.—Where during the past emergency, and while the railroads were under the control of the United States Government, machinery was shipped to the claimant company and the railroads failed to delivery within time for it to comply with its contract with the prime contractor for the delivery of sand and gravel by July 1, 1918, no implied agreement thereby results that the Secretary of War is authorized to adjust or settle under the provisions of the Dent Act. As the Railroad Administration operating the railroads was a separate and distinct organization the Secretary of War is in nowise responsible for its acts of commission or omission and has no authority to adjust or settle any damages resulting from its failure to make proper deliveries.

Maj. Farr writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is a class B claim for \$59,801.61 filed under the provisions of Supply Circular No. 17, Purchase, Storage and Traffic Division, 1919, and was filed by claimants with the W. F. Kearns Co., the prime contractor who, under date of June 6, 1919, forwarded the same to Lieut. Col. Charles R. Gow, constructing quartermaster, Army supply base, Boston, Mass., who transmitted the same to the War Department Claims Board, Construction Section, which, under date of November 30, 1920, directed the same to the War Department Claims Board, which, in turn, forwarded the said claim to this section.

2. In the spring of the year 1918 the War Department was engaged in building at Boston, Mass., an Army supply base, and W. F. Kearns Co. was a prime contractor, having under its charge certain cement construction, Charles R. Gow, lieutenant colonel, Quartermaster Corps, being the Government officer in charge of the construction. It becoming apparent to this officer that large quantities of sand and gravel would be needed, he opened negotiations with Mr. James Joseph Fitzgerald, of Boston, Mass., for the supplying by him to the prime contractor in question certain gravel and sand, indicating to the said Fitzgerald what would be required of him and the approximate quantity of sand and gravel that would have to be delivered to the Army supply base then under construction. The result of this conversation or negotiation being that on the 21st day of May, 1918, James Joseph Fitzgerald submitted the following proposal:

MAY 21, 1918.

The W. F. KEARNS Co.,
United States Quartermaster Terminal,
South Boston, Mass.

GENTLEMEN: I, James Joseph Fitzgerald, of Boston, hereby agrees to sell and deliver f. o. b. cars New York, New Haven & Hartford delivery at the United States quartermaster terminal, Sumner Street, South Boston, at the place at said terminal designated by the W. F. Kearns Co., screened gravel and screened sand suitable to the said W. F. Kearns Co., and approved by the constructing quartermaster, Maj. Chas. R. Gow, or his successor, in the following quantities and at the following prices:

Quantity.—In gross not to exceed seventy thousand (70,000) tons of screened gravel and thirty-five thousand (35,000) tons of screened sand.

Price to be \$2.10 per ton for screened gravel and \$1.20 per ton for screened sand, delivered f. o. b. cars at the said terminal; deliveries to commence on or before July 1, 1918. The minimum amount to be delivered to be not less than one thousand (1,000) tons of screened gravel and five hundred (500) tons of screened sand in each 24 hours.

Terms.—Thirty (30) days net; discount to be allowed of 2 per cent on invoice paid within ten days of date of the delivery of the material.

All material to be weighed by a public weigher, whose certificate must be attached to each invoice; or each invoice shall have attached thereon a weigher's certificate of the New York, New Haven & Hartford Railroad Company.

All measurements and weights shall be subject to check and approval of the constructing quartermaster or his representative.

JAMES JOSEPH FITZGERALD.

Witness: D. W. MURRAY.

3. The foregoing proposal was accepted by W. F. Kearns Co. and approved by Charles R. Gow, major, Quartermaster Corps, constructing quartermaster, by indorsement on the bottom in the following words:

“The foregoing proposal is hereby accepted subject to the approval of the contracting officer of the United States Government as provided in the contract between the United States and the said W. F. Kearns Co. and subject to the terms of said contract referring to said subcontracts.

W. F. KEARNS Co.,
By W. F. KEARNS, *Treasurer*.

Approved:

CHARLES R. GOW,
Major Q. M. C. A., Constructing Quartermaster.

4. On the 27th day of May, 1918, James Joseph Fitzgerald, of Boston, entered into a contract or agreement with the Fitzgerald Construction Co., a corporation authorized under the laws of the Commonwealth of Massachusetts, which, after the usual preamble, provided in paragraph 3 thereof for the assignment of the contract between Fitzgerald and the W. F. Kearns Co. as follows:

“Third. For the purpose of securing to the said Fitzgerald Construction Co. the due payment for material delivered as aforesaid, the said Fitzgerald hereby assigns and transfers to the said Fitzgerald Construction Co. all rights under the said contract with the said W. F. Kearns Co. to receive payment for said material, and authorizes the said Fitzgerald Construction Co. to receive payment of the same and to give full discharge and acquittance therefor in his name; and further agrees that in the event that any payment may be made to the said Fitzgerald for any material delivered as aforesaid, to hold the said payment in trust for the said Fitzgerald Construction Co., and to deliver and pay over to the said Fitzgerald Construction Co. the identical amount thereof.”

5. The claimant in this case, the Fitzgerald Construction Co., alleges that upon the execution of the contract or agreement that the W. F. Kearns Co. had thereupon proceeded to put itself in position to comply with the terms of the contract with Kearns & Co. and made certain commitments for machinery and certain expenditures in securing gravel rights, and certain other expenditures in removing loam that covered the gravel and building bins, installing ma-

chinery and securing the necessary boiler and other permits for the operation of the plant.

6. Claimant apparently proceeded to rush the work of preparing for the furnishing of the gravel in accordance with the contract of W. F. Kearns & Co., which contract provided that deliveries should begin on the 1st day of July, 1918, and it becoming apparent to the W. F. Kearns Co. that possibly there might be some failure on the part of James Joseph Fitzgerald to make deliveries in accordance with the terms of the contract, the said company under date of June 25, 1918, advised James Joseph Fitzgerald as follows:

W. F. KEARNS CO., GENERAL CONTRACTORS,
BOSTON QUARTERMASTER TERMINAL,
Boston, Mass., June 25, 1918.

Mr. JAMES JOSEPH FITZGERALD,
(Care of David W. Murray, Esq.),
Barristers' Hall, Boston, Mass.

DEAR SIR: We desire to call your attention to the following provision in your proposal, accepted by the W. F. Kearns Co. and approved by Maj. Charles R. Gow, constructing quartermaster:

"Deliveries to commence on or before July 1, 1918. The minimum amount to be delivered to be not less than one thousand (1,000) tons of screened gravel and five hundred (500) tons of screened sand in each 24 hours."

The work which the W. F. Kearns Co. is doing for the United States is of such a character that every effort is being made to speedily complete the same. To that end we are working full night and day shifts.

We therefore will insist on your strict compliance with the terms of your proposal, both as to time of deliveries and also as to quantities and quality. Failure on your part to carry out the terms of said proposal will necessitate the W. F. Kearns Co. securing gravel and sand from other sources.

Yours, very truly,

W. F. KEARNS COMPANY,
By W. F. KEARNS, *Treasurer.*

7. On the 1st day of July claimant had failed to make any deliveries, and under date of July 8, 1919, W. F. Kearns Co. directed to Mr. David W. Murray, of Barristers' Hall, Boston, Mass., the attorney for James Joseph Fitzgerald, the following letter:

JULY 8, 1918.

Mr. DAVID W. MURRAY,
Barristers' Hall, Boston, Mass.

DEAR SIR: The proposal dated May 21, 1918, and submitted by you to the W. F. Kearns Co., which proposal was accepted by the W. F. Kearns Co., and approved by Charles R. Gow, major, Q. M. C. N. A., is hereby revoked and canceled by the said W. F. Kearns Co.

This action is taken because of your failure to comply with the terms and conditions of your said proposal.

Yours, very truly,

W. F. KEARNS COMPANY,
By W. F. KEARNS, *Treasurer.*

8. The record seems to indicate that the claimant company immediately protested this action, alleging that their failure to comply with the terms of the contract entered into by W. F. Kearns & Co. with Mr. Fitzgerald was due entirely to the failure of the railroad company, then operated by the United States Government, to make deliveries of the necessary machinery in time and that they should not therefore be compelled to forfeit their contract for delays occasioned through no fault of their own and which delays could not be prevented and were caused solely by the railroad company then under Government control.

9. The file further shows that at or about this time the claimant was told by W. F. Kearns Co. that it would give them additional orders of indefinite amount to supply such of their requirements as might arise in excess of those already provided for. After the date of the cancellation of the contract between the claimant company and W. F. Kearns Co., which cancellation was apparently accepted by claimant, it received an order, dated July 23, 1918, for 1,000 tons of screened gravel at \$1.50, or a total of \$1,500, and under date of July 27, for delivery at job "R," 2,000 tons at \$1.50 per ton, or a total of \$3,000. On August 30, 1918, the W. F. Kearns Co. advised the Fitzgerald Construction Co. that it would need no further shipments under the last-named order, no evidence having been submitted to show what were the total deliveries, if any, under the order of July 27, 1918.

10. Under date of May 10, 1920, Charles R. Gow, former lieutenant colonel, Quartermaster Corps, constructing quartermaster, directed a letter to Maj. C. M. Foster, of the Construction Division, Washington, D. C., which is herewith quoted:

"I have been asked by Mr. Murray, attorney for the Fitzgerald Construction Co., to write you giving a statement of the facts pertaining to the claim of the Fitzgerald Construction Co. growing out of the erection by it of a gravel screening plant at Braintree for the purpose of supplying concrete aggregate for the Boston Army supply base.

"Soon after the contract for the Boston Army supply base was signed, the Fitzgerald Construction Co. located a very good deposit of sand and gravel adjacent to the New York, New Haven & Hartford Railroad at South Braintree, Mass. Their representatives sought a contract with the general contractor for supplying him with the necessary sand and gravel for his contract requirements, and such a contract was entered into in the form of a purchase order for a specified amount, deliveries to begin on June 1, 1918.

"Owing to embargoes made necessary by war activities there was a very considerable period of delay in the delivery of the screening apparatus and other equipment required for the plant. In the meanwhile progress on the work had exceeded our anticipation, and it was absolutely essential that deliveries of concrete aggregate should

begin early in June. In view of the inability of the Fitzgerald Construction Co. to make deliveries as called for (because of their failure to receive equipment), it was deemed necessary by me that the contractor should make other arrangements for sand and stone in order that the progress of the work should not be interrupted. Acting under my instructions the contractor entered into agreements with several local crush-stone contractors to open up their quarries which had been shut down, and in order to secure a sufficient daily delivery guaranties had to be given as to the total deliveries which covered the entire requirements of the work. This new arrangement, of course, made it impossible to continue the contract with the Fitzgerald Construction Co., which was considered to have been automatically canceled through their failure to make deliveries by June 1, as agreed in the purchase order.

"The Fitzgerald Construction Co. made a verbal protest against this procedure on the grounds that their failure to deliver was due to the interference of the United States Government in refusing them deliveries of needed equipment, and further stated that they were suffering a great injustice through the expense which they had been put to in opening a pit and purchasing materials and equipment which would be valueless to them if they were denied opportunity to proceed with their contract.

"The general contractor then made a proposal that they should agree to cancellation of the original contract provided he would give them an additional order of an indefinite amount to supply such requirements as might arise in excess of those already provided for, the purpose being to reimburse them so far as possible for the loss entailed by their failure to receive equipment. It became necessary, however, to change over the plant arrangements for handling concrete materials so that car deliveries were not satisfactory for our purpose, and, as a matter of fact, very little material was ordered on the second contract. The matter was brought to my attention and to that of the general contractor on several occasions by representatives of the Fitzgerald Construction Co., but I always felt that I was not justified in recognizing claims of this sort, consequently no action was ever taken by me with regard to it."

Under date of October 22 Charles R. Gow directed a further letter to Mr. Murray, in which he states:

"Theoretically the contract in question was made with the general contractor for the Boston Army supply base, viz, the W. F. Kearns Co. As a practical matter the contract was negotiated and accepted by me acting as the representative of the United States Government.

"The contract for the construction of the Boston Army supply base was made under the customary cost-plus-a-fee basis wherein the contractor was reimbursed for all expenditures made by him in connection with the work and in addition was paid a fixed fee. In this particular case the contractor received the maximum fee allowable.

"Under his contract it was immaterial to the contractor whether he or the Government purchased the necessary materials, because his fee was fixed irrespective of this feature. It was optional with me as constructing quartermaster to direct purchases to be made through his office or to make them direct as the Government's representative.

In order to simplify office procedure and especially because of certain legal technical requirements where purchases are made by a Government official, it was deemed expedient to have the great bulk of purchases made through the contractor's office.

"You are correct in your recollection that you dealt directly with me in arranging the terms of the subcontract for the Fitzgerald Construction Co. matter and that after I had accepted your proposition I directed the contractor to make a subcontract with you for the amount. I also subsequently directed him to cancel your contract at the expiration of the time limit, because I felt we could no longer wait for the erection of your equipment and the production of sand and gravel. In each stage of the controversy the contractor acted entirely at my direction and not of his own volition."

11. On or about the 22d day of June, 1919, the claimant company, together with W. F. Kearns Co. held a conference in the office of Charles R. Gow, lieutenant colonel, Quartermaster Corps, then constructing quartermaster, at which conference a formal claim was then and there prepared and which was agreed by the parties in the conference was a fair claim of the Fitzgerald Construction Co. and which the said W. F. Kearns Co. might present to the War Department Claims Board on behalf of the Fitzgerald Construction Co. The W. F. Kearns Co. was then and there given the claim for presentation to the Government and, while not actually refusing to sign or submit the said claim, has neglected to do so and has submitted no reason therefor, the claim now being presented to this board being filed directly by the Fitzgerald Construction Co. and not by the W. F. Kearns Co., the prime contractor that had the contract for certain or all of the cement work at the Boston supply depot, nor by James Joseph Fitzgerald, the party to whom the order or contract in question was issued.

12. No hearing was had on this claim as the petition and file attached thereto fully set forth all the facts in the case, and as the questions before us for decision are more questions of law than of fact, we did not believe an oral presentation of the claim would result in placing before this Board any facts not already set up and disclosed by the petition and files.

DECISION.

1. The questions herein presented for our decision can readily be resolved into two only:

First. Did claimant enter into a contract with the prime contractor, in this instance the W. F. Kearns Co., or did the negotiations with Charles R. Gow, lieutenant colonel, Quartermaster Corps, constructing quartermaster, result in a contract with the United States Government and not with the W. F. Kearns Co., the prime contractor?

(a) Did James Joseph Fitzgerald, by the assignment of the bid or contract entered into by him with the prime contractor, W. F. Kearns Co., lose any rights he might have had to prosecute any claims against the United States Government, and thus preclude claimant from any recovery?

Second. Was the W. F. Kearns Co., the Government's prime contractor, within its rights and justified in canceling the contract with James Joseph Fitzgerald or the claimant company?

2. Referring to the first question here, and for the sake of argument admitting that James Joseph Fitzgerald was invited into negotiations by the constructing quartermaster who agreed with him upon tentative quantities of material needed and prices therefor which—if he had acted upon and made commitments and bought machinery for the purpose of fulfilling the same—might have resulted in an agreement with the United States Government which the Secretary of War could, under the provisions of the act of March 2, 1919, adjust or settle, we are nevertheless confronted with the fact that after these negotiations and conferences with Lieut. Col. Gow the said Fitzgerald submitted to the prime contractor, the W. F. Kearns Co., a formal bid, which bid was accepted by the W. F. Kearns Co. subject to the approval of the constructing quartermaster, which approval was indorsed upon the foot of the proposal in question.

3. This brings us then to that elementary principle of law, that all prior or contemporaneous negotiations are embodied and embraced within the written contract that follows the negotiations, so that in this case the only resulting contract is the contract presented by the formal bid of James Joseph Fitzgerald, accepted by the W. F. Kearns Co. Fitzgerald, after his negotiations with Lieut. Col. Gow, then abandoned same and entered into a written contract with the W. F. Kearns Co. which released the United States Government from any and all liability that might have rested upon it as a result of the negotiations between Fitzgerald and Lieut. Col. Gow. Therefore no informal contract resulted from the negotiations between James Joseph Fitzgerald and the United States whereby the United States is liable to him or his assignee, but must look to the W. F. Kearns Co., his prime contractor for any reimbursement he or his assignee may think he or it is entitled to on account of any commitments made for the purpose of fulfilling the contract in question.

4. Nor does this Board believe that by W. F. Kearns Co., after the cancellation of the formal order, agreeing with claimant, it would receive future orders from the W. F. Kearns Co. for an indefinite amount of sand and gravel, place any liability upon the United States Government, because claimant did receive such orders even they were

small in amount. W. F. Kearns Co. therefore kept its agreement with the claimant.

(a) "Did James Joseph Fitzgerald, by the assignment of the bid or contract entered into by him with the prime contractor W. F. Kearns Co., lose any rights he might have had to prosecute any claims against the United States Government?"

If we adopt, for the sake of this discussion the contention of the claimant, and admit that the contract in question, by being entered into with the prime contractor, was yet in fact entered into with the United States Government, then, even considering it in this most favorable light, the claimant is positively precluded from recovering from the United States Government any sums of money because the assignment of contracts or orders is positively prohibited by the Revised Statutes, section 3737, in the following language:

"Sec. 3737. No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties are reserved to the United States."

5. Taking up the second point—

"Was the W. F. Kearns Co., the Government's prime contractor, within its rights and justified in cancelling the contract with James Joseph Fitzgerald or the claimant company?"

This Board is of the opinion that time being of the essence of the contract, which was well known to claimant, and Fitzgerald having been advised prior to the date set for the delivery of the products called for in the contract that failure to comply with delivery dates would result in cancellation, and well knowing the absolute need of the United States Government for the building then under construction, that upon the failure of Fitzgerald or his assignee to supply the material in strict accordance with the terms of the said contract, that the W. F. Kearns Co., the prime contractor of the United States Government was justified in canceling the said contract and placing the same elsewhere, where deliveries of the materials that were so badly needed were assured. By the said cancellation of this contract, notwithstanding the fact that claimant alleges its failure to deliver the material in question within the time limit was occasioned by the failure of the railroad to deliver to it the necessary machinery for the screening of the gravel in question, no liability in the opinion of this Board rests upon the W. F. Kearns Co. or the United States Government to reimburse claimant for any sums of money so lost by its inability to secure delivery of machinery in time for compliance with the terms of the order or contract.

6. Nor does this Board believe that there is any merit in the contention of the claimant that the delay of the railroad company, then operating under Government control, is any excuse for it not living up to its solemn obligations to deliver the material in question within the time limit of the contract.

7. The law relative to the change of conditions after the signing of the contract, and during the time of performance that will not excuse a contractor from compliance with the same, is correctly stated in the decision of the *Phoenix Bridge Co. v. United States* (38 Ct. Cls., p. 510).

“It is, we think, in such cases, elementary law, needing no authority in support of it, that if a party contracts to perform anything which is possible at the time when the contract is made, but afterwards becomes an impossibility, he is liable in damages resulting from nonperformance thereof, the distinction is that if an obligation be imposed by law, and does not arise from his contract, if it be rendered impossible afterwards by the act of God, or by the act of the Government, he will be excused for nonperformance. In the case presented the obligation does arise from the contract of the party, and does not therefore fall within the exception of things rendered impossible by the act of God. The rule is that if a person desires exemption from such acts it must be so provided in the contract (*Story on Contracts*, sec. 975; *Chitty id.*, 1074), and there is no pretense that such was done in the present case.”

8. The railroad conditions at the time the claimant entered into its contract with the W. F. Kearns Co. were then as badly congested and delays as great as they were after claimant ordered its machinery, and Fitzgerald at the time he entered into the contract must have known these conditions and must have known that there was no assurance whatsoever that any machinery that had to be delivered by the railroads could or would be delivered in time, and any damage occasioned claimant by the failure of the railroad company to deliver to claimant its machinery in time for it to begin operations before July 1, 1918, notwithstanding the fact that the railroads were then under Government control, can, in no way place any obligation upon the War Department to reimburse it for the losses occasioned by this delay. If claimant has any right of action against any Government Department, which we in no wise admit, the same certainly would not be against the War Department, since the railroads were operated and conducted by the United States Railroad Administration, a separate and distinct bureau from the War Department, over which the War Department had no control and can in no wise be bound by any of its acts or omissions.

9. This Board does not believe that, for the purposes of this decision, it is material whether or not the claimant had a contract with the United States Government or with the prime contractor. The

contract in question was canceled for nonperformance at a time when the absolute necessity of the Government compelled it to secure its supplies elsewhere and it is the opinion of this Board that the prime contractor or the Government itself was justified in the cancellation of the said contract.

10. For the foregoing reasons all relief asked for by the claimant is denied.

DISPOSITION.

A final order denying relief will issue.

Lieut. Col. McKeeby and Capt. Sheppard concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

DECEMBER 23, 1920.

Case No. 1148.

In re **CLAIM OF FRENCH MANUFACTURING CO.**

1. **INFORMAL AGREEMENT.**—Where a contractor allocates to a proxy-signed contract sufficient material to perform said contract and later finds it necessary to use some of the material allocated to the proxy-signed contract in order to complete the performance of a purchase order, and thereafter purchases more material and allocates a portion of this latter purchase to the proxy-signed contract, the contractor is entitled to the loss incurred on account of the purchase of the raw material so allocated to the proxy-signed contract.
2. **CLAIM AND DECISION.**—Claim for \$5,336.14 under the act of March 2, 1919, for loss incurred in the purchase of thread yarn for use in the manufacture of thread. The facts are stated in an opinion reported in Volume IV, page 909. On appeal the Secretary of War set aside the previous decision and remanded claim to the Appeal Section, War Department Claims Board, for further proceedings. Held, claimant is entitled to recover the difference between the market price of the raw material on the date of purchase and the market price on the date of sale of the raw material, which was within a reasonable time after suspension of the contracts.

Capt. Miller writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim for \$5,336.14 was decided adversely to claimant in a decision of the War Department Board of Contract Adjustment, dated April 3, 1920, reported in Volume IV, Part II, page 467, and thereafter the claimant took an appeal to the Secretary of War.

2. The Secretary of War, on November 13, 1920, remanded the claim to the War Department Claims Board with the following order:

NOVEMBER 13, 1920.

In the matter of the claim of French Manufacturing Co., Claim No. 150-C-1148.

ON APPEAL BEFORE THE SECRETARY OF WAR.

Upon consideration of the record herein, it is ordered that the decision of the Board of Contract Adjustment be set aside; that further proceedings be had; that additional testimony be taken and the

case decided in accordance with the law and evidence as shown in such further proceedings.

NEWTON D. BAKER,
Secretary of War.

3. The claim involves a loss alleged to have been incurred in connection with the purchase of raw material in the performance of proxy-signed contracts, Ordnance No. P-11225-5826-Eq, for 16,350 pounds of 10/3 olive drab, reverse twist, cotton thread at \$1.80 per pound. This contract was suspended after the manufacture of 12,152 pounds, leaving a balance of 4,198 pounds not accepted by the Government.

4. On September 11, 1918, claimant placed an order with the Hawthorn Spinning Mills for 25,000 pounds of thread yarn to be used in performing its Government contracts. This order was accepted by the Hawthorn Spinning Mills on September 13, 1918. Claimant allocated to the contract of July 3, 1918, sufficient thread yarn to complete the manufacture of the 4,198 pounds.

5. When the claim was considered by the Board of Contract Adjustment the record contained a letter dated January 23, 1920, in which claimant stated: "When we ordered this yarn we had sufficient material already on hand to complete actual orders we had." In its appeal to the Secretary of War, claimant submitted documents not previously in the file, among which was a letter dated September 9, 1918, signed by William Drinkwater, thread buyer in the cotton goods branch of the Clothing and Equipage Division, Quartermaster General's Office, reading as follows:

"1. Referring to your quotation of September 5, order in Government form will be sent to you for 8,200 pounds of 10/3 O. D. Sea Island reverse soft finish thread, one (1) pound tubes, at \$1.88.

"By authority of the Acting Quartermaster General."

6. At the hearing conducted on December 8, 1920, Mr. G. F. Waters, general manager of the French Manufacturing Co., who wrote the letter of January 23, 1920, testified that his company had received from Mr. Drinkwater an order for 8,200 pounds of 10/3 thread before this company placed with the Hawthorn Spinning Mills the order for 25,000 pounds of thread yarn, and explained that in writing the statement quoted from his letter of January 23, 1920, he used the term "actual orders" in referring to purchase orders or contracts in regular form received from the Government; that it was not his intention to advise the Government that when his company placed the order with the Hawthorn Spinning Mills it had on hand sufficient material to complete the informal order of September 9, 1918, and that, as a matter of fact, his company did not have on hand on September 11, 1918, sufficient material to complete Mr. Drinkwater's order of September 9, 1918. This company had been advised on September 9,

1918, by Mr. Drinkwater that an "order in Government form" would be sent the French Manufacturing Co. for 8,200 pounds of thread and, partly on the strength of this information, claimant placed an order with the Hawthorn Spinning Mills.

7. The evidence further shows that the Government required claimant to complete the order of September 9, 1918, for 8,200 pounds of thread before completing the proxy-signed contract of July 3, 1918, and that consequently it became necessary for claimant to take from the contract of July 3, 1918, thread yarn sufficient to manufacture 4,198 pounds of thread in order to have sufficient thread yarn to complete the informal contract of September 9, 1918. Claimant was then compelled to allocate to the contract of July 3, 1918, thread yarn purchased from the Hawthorn Spinning Mills on September 13, 1918, in a quantity sufficient to complete the 4,198 pounds of thread now outstanding on the proxy-signed contract of July 3, 1918.

8. The testimony shows that it requires about $1\frac{1}{2}$ pounds of cotton to make 1 pound of thread yarn. In fact, an official audit covering the activities of the Hawthorn Spinning Mills for the period commencing July 1, 1918, and ending December 31, 1918, shows that from 100 per cent of cotton there was manufactured 67.29 per cent thread yarn. It was further shown that in manufacturing thread from thread yarn there develops a loss of about 10 per cent.

9. The Hawthorn Spinning Mills purchased one-half fancy and one-half extra choice sea-island cotton for the production of the 25,000 pounds of thread yarn. The market price of fancy sea-island cotton on September 13, 1918, was 72 cents, the market price on extra choice being about one-half a cent lower. This was 2 cents higher than the quotations for sea-island cotton f. o. b. Savannah.

10. The Hawthorn Spinning Mills was first notified by the Government on November 28, 1918, to stop production of thread yarn to be used in Government orders on November 30, 1918. On or about December 16, 1918, this company was notified to sell the cotton purchased for the manufacture of this thread yarn. The record contains many letters written by the Hawthorn Spinning Mills in an effort to dispose of this cotton. The reports of the principal dealers in sea-island cotton for the period from November 30, 1918, to January 15, 1919, show that the market during that time was practically nominal and that very few sales were being made. The Hawthorn Spinning Mills, however, did sell this cotton on January 15, 1918, for $51\frac{1}{2}$ cents per pound. The market price of extra choice sea-island cotton from December 27, 1918, to January 11, 1919, was 52 cents per pound, and fancy sea-island cotton accordingly about $52\frac{1}{2}$ cents per pound. The next quotation that could be found following January 15, 1919, the date of the sale of the cotton, was January 18, 1919, when the price had advanced a few cents.

DECISION.

1. By direction of the Secretary of War, as set forth in the foregoing order of November 13, 1920, the decision of the War Department Board of Contract Adjustment dated April 3, 1920, denying relief is hereby vacated and set aside.

2. The evidence before the Board clearly shows that claimant allocated to the proxy-signed contract of July 3, 1918, from the purchase of 25,000 pounds sufficient thread yarn to complete the manufacture of 4,198 pounds of thread, the undelivered portion of the contract at the time of suspension. It is true that claimant had previously allocated other thread yarn to this contract of July 3, 1918, but, after taking from said contract of July 3, 1918, a quantity of thread yarn to complete a smaller and more urgent order, an allocation was properly made to the contract of July 3, 1918, from the order of September 11, 1918, accepted September 13, 1918, with the Hawthorn Spinning Mills for 25,000 pounds of thread yarn. This allocation was sufficient to complete the undelivered portion of the contract.

3. Claimant did not have on hand on September 11, 1918, sufficient thread yarn to complete its contract of July 3, 1918, and the informal order of September 9, 1918, for 8,200 pounds of thread.

4. There should be allowed claimant the difference between the market price of one-half fancy and one-half extra choice sea-island cotton on September 13, 1918, and the market price of this cotton in the same proportions on January 15, 1919. The market price of fancy sea-island cotton f. o. b. mills on September 13, 1918, was 72 cents, and the evidence shows that the market price of extra choice would therefore be $71\frac{1}{2}$ cents. The market price of the mixture should then be $71\frac{3}{4}$ cents. The Hawthorn Spinning Mills originally fixed this market price at 73 cents, but later stated that 72 cents would be fair. It appears to the Board, however, that since this cotton was one-half fancy and one-half extra choice, the market price would be $71\frac{3}{4}$ cents f. o. b. mills September 13, 1918. Since the market price of extra choice sea-island cotton was 52 cents on January 15, 1919, the mixture of one-half fancy and one-half extra choice would figure at $52\frac{1}{4}$ cents. Claimant should be allowed the difference between $52\frac{1}{4}$ and $71\frac{3}{4}$ cents on sufficient cotton to manufacture 4,198 pounds of thread.

5. In view of the fact that the Hawthorn Spinning Mills produced 67.29 pounds of thread yarn from 100 pounds of cotton during the latter half of the year 1918, the settlement should be figured on the basis that these percentages would have been maintained in manufacturing the thread yarn for this contract. It must be assumed that the French Manufacturing Co. would have lost 10 per cent of the thread yarn in manufacturing the thread. Both opera-

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tions must be considered in determining the amount due on this claim.

DISPOSITION.

A copy of this decision will be transmitted to the Purchase Section, War Department Claims Board, for appropriate action.

Lieut. Col. McKeeby and Capt. Morgan concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

DECEMBER 23, 1920.

Case No. 2988.

In re CLAIM OF WISCONSIN MOTOR MANUFACTURING CO.

1. JURISDICTION.—In order for the Appeal Section, War Department Claims Board, to assume jurisdiction of a claim of a subcontractor it must affirmatively appear that the claim was filed by the prime contractor originally or by the subcontractor through the prime contractor.
2. SAME.—It must satisfactorily appear that the claim was presented to a Government agency within the time prescribed by the act of March 2, 1919, in order to cover jurisdiction upon the Secretary of War.

Maj. Blackburn writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim arises under the act of March 2, 1919. Statement of claim Form B has been filed in accordance with Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$21,733.31 by reason of an agreement alleged to have been entered into between the claimant and the United States. The claim is before this Board on original petition filed by claimant and has been assigned for decision on the record as made up.

2. The facts and circumstances out of which the claim arises are as follows: In paragraph 1 of claimant's petition it is alleged that on or about April 14, 1918, claimant entered into an agreement with an officer or agent of the United States for additional work, labor, and services upon motors then in the process of manufacture pursuant to an agreement previously entered into between the claimant and the Premier Motor Corporation, Indianapolis, Ind., who held the prime contract with the United States for the delivery of 3,660 "Model A" motors to be used in four-wheel-drive trucks, for the use of the United States Army. It is alleged that in order to complete the motors quickly and in quantities desired by the Government, and at the same time comply with rigid tests required by Government inspectors, additional cost was incurred, the same being represented by the following items:

	Motors.	Unit cost.	Aggregate price.
Welding.....	1,815	\$1.0812	\$1,962.38
Testing.....	1,815	4.24	7,695.60
Spraying crank cases.....	1,636	.1780	292.68
Running in crank case main bearings.....	1,636	1.4794	2,420.30
Crank cases rejected less salvage.....	1,815	5.16	9,362.85

The claimant alleges that the total additional cost of \$21,733.31, itemized above is applicable to motors produced and delivered to the Premier Motor Corporation and that same is reasonable remuneration for the expenditures, obligations, and liabilities necessarily incurred in performance of contracts.

3. The record shows that claimant had four purchase orders from the Premier Motor Corporation and also five purchase orders from the Mitchell Motor Co. The claim under consideration grows out of the transaction with the Premier Motor Corporation. There is no evidence in the record tending to show any contractual relations between the Wisconsin Motor Manufacturing Co., claimant, and the United States. While claimant states in its petition that it entered into "and agreement with an officer or agent acting under the authority, direction, or instruction of the Secretary of War," the entire record shows clearly that the claimant was a subcontractor of the Premier Motor Corporation. From the petition and the file it appears that it was the intention of the claimant to have this claim considered by the Appeal Section on the theory that an implied agreement arose between the claimant and the United States.

4. The Appeal Section has written three letters, since the filing of this claim, to the Premier Motor Corporation requesting to be advised as to whether or not its claim with the Government had been settled and also as to whether or not they had settled with this subcontractor or were willing to present a claim for this subcontractor. No reply to any of these letters has been received.

5. The present statement of claim was filed July 27, 1920. So far as the record shows the claim was not presented to any agency of the Government within the time specified in the act of March 2, 1919, for presenting claims, although the following statement does appear at the end of claimant's petition:

"This claim has been duly presented prior to June 30, 1919, to Ordnance Department claims board, Cincinnati, Ohio, and also to Ordnance Department claims board, Chicago, Ill."

Claimant submits no statement, letter, or showing from either of the Boards mentioned in substantiation of this statement.

DECISION.

1. It satisfactorily appearing in this case that whatever work claimant performed or whatever material claimant furnished was performed and furnished as a subcontractor of the Premier Motor Corporation. The claim not having been presented by the prime contractor, or by the subcontractor through the prime contractor, this Board is without jurisdiction to consider same. It is our opinion

that from the record as presented there was no privity of contract between the claimant and the Government.

2. For the reason stated in paragraph 1 of this decision and for the further reason that it does not satisfactorily appear by affirmative testimony that the claim was presented to an agency of the Government within the time prescribed by the act of March 2, 1919, the relief prayed for must be denied.

DISPOSITION.

A final order denying relief will issue.

Lieut. Col. McKeeby concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

DECEMBER 27, 1920.

Case No. 2248.

In re **CLAIM OF ANNISTON STEEL CO.**

- 1. ALTERNATIVE RELIEF—DEPRECIATION—ALLOWANCE FOR USE AND OCCUPATION.**—Where claimant includes an item for plant depreciation in its claim and suggests to the bureau board and also to the Board of Contract Adjustment or this Board as alternative relief an allowance for use and occupation the Appeal Section will consider the matter as if the alternative had been formally asked for.
- 2. BETTERMENTS.**—Where repairs to claimant's plant amount to permanent betterments and allowances are made therefor such allowances may be offset against a claim for use and occupation.
- 3. CLAIM AND DECISION.**—This case was decided by the Board of Contract Adjustment on February 18, 1920, in part denying and in part allowing the claim. On appeal to the Secretary of War the claim was returned to the Appeal Section to determine whether claimant was entitled to allowance and occupancy of the plant, and, if so, to determine whether or not the betterments for which allowances have been made exceeded a reasonable allowance for use and occupancy of the plant. The former decision of the Board of Contract Adjustment, reported in Volume III, page 862, is modified in accordance with the directions of the Secretary of War. A statement of the facts will be found in said decision.

Lieut. Col. Smith writing the opinion of the Board.

ON RECONSIDERATION.

1. This case was decided by the Board of Contract Adjustment on the 18th day of February, 1920, the decision being in part favorable and in part adverse to claimant.

2. From that decision claimant noted an appeal to the Secretary of War, who, upon consideration of the record, under date of November 30, 1920, returned the record to the War Department Claims Board with the following order:

“Upon consideration of the entire record, it is directed that further proceedings be had by the Appeal Section, War Department Claims Board, in accordance with the recommendations contained in the accompanying memorandum.”

3. The memorandum referred to in the order of the Secretary is as follows:

“The questions involved in this appeal are:

“(a) Is claimant entitled to an allowance for depreciation in the value of its machinery based on the difference between its value on

the date claimant entered into the contract and its value at the time the contract was suspended?

"(b) If not entitled to an allowance for depreciation, should the Board of Contract Adjustment have considered the alternative relief by way of rental suggested to the district board and also to the Board of Contract Adjustment, but not included in the claim as filed?

"*Depreciation.*—The value of the plant on the date of the contract, as fixed by claimant, is an inflated value due to war conditions. The claimed depreciated value resulted from the cessation of hostilities and was not due to wear and tear on the plant during performance of the contract, since only three shells were produced prior to the date of suspension, and therefore there could have been no appreciable wear upon the plant facilities due to use in performing the contract, and claimant does not contend that the depreciation resulted from such use.

"Shortly prior to the time it entered into the contract, claimant had an offer to sell its plant, but it believed that by entering into the contract it would better its financial condition.

"Attention is not called to any recognized theory of adjustment of War Department contracts authorizing the allowance of depreciation due to the causes stated, and I know of no theory upon which such an allowance can be made.

"It is recommended that the action of the Board of Contract Adjustment in denying claimant relief for depreciation of its plant be affirmed.

"*Rental value.*—In paragraph 2 of the decision of the Board of Contract Adjustment it is stated that claimant suggests that if the Board does not allow its claim for depreciation, then claimant should be allowed for loss of the rental value of its plant. This alternative relief suggested by claimant was not considered by the Board of Contract Adjustment as it believed the Board was not authorized to consider the alternative relief because the claim for rental had not been filed with the Cincinnati ordnance district claims board. The opinion recites that claimant is not precluded from taking such further action in regard to claim for loss of rental as it may deem advisable, and that the denial of the item of depreciation is without prejudice to the right of claimant to take action before the Cincinnati ordnance district claims board in regard to the claim for the rental of the plant as claimant may deem advisable.

"The simple affirmance of the opinion of the Board of Contract Adjustment would leave claimant possessed of the right to present its claim for rental to the Cincinnati ordnance district claims board, and thus the final adjustment of claimant's contract would be further delayed. It is my opinion that the Secretary of War should consider the alternative claim for rental suggested to the Cincinnati ordnance district claims board and the Board of Contract Adjustment, as if the claim for rental had been duly filed with the District Board and by it disallowed and carried to the Board of Contract Adjustment on appeal, this would expedite the final adjustment of claimant's contract.

"It is not unusual under the circumstances such as shown by the record to allow a reasonable charge for the use and occupancy of that part of the plant to be devoted to the performance of the contract, during the period of preparation for performance.

"There are some suggestions in the record that, as the result of moneys expended for repairs to the plant for which allowance was made in the award offered, claimant's plant was in much better condition for commercial purposes at the time of suspension than at the time the contract was entered into. If, as a matter of fact, betterments had accrued to the plant from expenditures made in preparation for the performance of this contract for which allowance has been made in the award offered claimant, this fact should be taken into consideration and the value of such betterments should be offset against the charges for use and occupancy.

"*Recommendations.*—It is recommended as follows: That the record be returned to the Appeal Section, War Department Claims Board; that the Appeal Section be directed—

"(a) To determine the amount, if any, which should be allowed claimant by way of use and occupancy of the plant as rental.

"(b) Also to determine whether the value of claimant's plant was increased by reason of betterments made during the period of preparation to perform the contract, for the expense of which allowances are included in the award offered; and

"(c) If so, to determine the reasonable value of such betterments; and

"(d) If the amount of rental determined as hereinbefore suggested exceeds the value of the betterments so determined, that the Appeal Section ascertain the amount of such difference and return the record to the Ordnance Section with instructions to increase its offer of award by the amount as so ascertained by the Appeal Section.

"(e) If the Appeal Section finds that the value of the betterments exceeds a reasonable allowance for use and occupation determined as hereinbefore suggested, the decision of the Board of Contract Adjustment should be modified to conform to such finding; and

"(f) In any event, upon a reconsideration of the case by the Appeal Section, the claim should be disposed of as if the suggested alternative relief had been brought before the Appeal Section by appeal in the usual manner; and

"(g) The opinion of the Board of Contract Adjustment should be modified accordingly.

"(h) That part of the decision of the Board of Contract Adjustment denying relief to claimant for depreciation in the value of the plant should be affirmed.

"J. A. HULL,
"Colonel, Judge Advocate, Vice Chairman,
"War Department Claims Board."

4. It is believed that the matters referred to this Board for determination can be satisfactorily determined from the record without further hearing. The questions directed by the Secretary of War to be considered will be taken up in the order in which they appear in the above memorandum.

5. (a) At the time claimant received notice that the contract had been awarded, the value of the plant, for the purpose of fixing a reasonable rental, was \$130,000. (This being the minimum amount stated by claimant's president to be a fair value for the purpose of

determining rental, R., 33.) While he testified that 20 per cent per annum would be a reasonable per centum upon which to calculate the rental, yet it is the opinion of the Board that such per centum is too high, and that under all the circumstances of this case 6 per cent per annum would be reasonable. Calculated on this basis the annual charge for use and occupation of the plant would be \$7,800. The plant was idle during preparations for performance of the contract for about five months (R., 74), and after suspension, during the change from a shell plant to a commercial plant, it was idle about three months (R., 74), so that the period during which a charge for use and occupation should be considered would be eight months, for which a reasonable allowance would be \$5,200.

(b) The Board determines that the value of claimant's plant was increased by reason of betterments made during the period of preparation to perform the contract, for the expense of which allowances are included in the award offered.

(c) In view of all the allowances offered on account of the preparatory expense, it is believed that permanent betterments resulted of a value of at least \$1,745.95, as claimant has been allowed, among others, the following items:

Labor in repairing machinery and equipment.....	\$1, 240. 95
Repairs to buildings:	
Labor.....	300. 46
Material.....	474. 69
Repairs to pumps	421. 98
Repairs to shears	85. 05
Small tools (drills, files, etc.).....	463. 77

It is possible that some of the small tools may have been consumed or partially so in the work of preparation. However, if this be true the value so consumed is more than taken care of by other items included in the award offered, to which attention has not been called in the above list of items, but which omitted items added permanent betterments to the plant.

(d) While there is no item of depreciation included in the rehabilitation charge of \$10,000 allowed by the Cincinnati Ordnance district claims board and affirmed by the Ordnance Claims Board and no item was therein specifically stated to include any charge for use and occupancy of the plant during the period of reconstruction, yet it is believed, in view of all the facts and circumstances in the case, including other allowances, that the charge for use and occupation of the plant during the three months' period of reconstruction is sufficiently taken care of in the rehabilitation allowance of \$10,000. So there remains to be allowed only an item for use and occupancy of the plant for a period of five months, which charge, based on the annual rental of \$7,800, would be \$3,250. From this sum should be

deducted the value of the permanent betterments in the amount heretofore determined, \$1,745.95, leaving the net amount claimant should be allowed for use and occupancy of the plant \$1,504.05, by which sum the award offered by the Ordnance Claims Board should be increased.

(e) Since the Board has found that the value of the betterments does not exceed the reasonable allowance for use and occupancy, nothing further need be said under this head.

(f) The matter of rental or use and occupancy of the plant has been considered by this Board as if this suggested alternative relief had been brought before the Appeal Section by appeal in the usual manner, and paragraphs 2 and 3 of the "Decision" of the Board of Contract Adjustment are modified accordingly.

(g) The opinion of the Board of Contract Adjustment is modified in accordance with the views herein expressed.

(h) That part of the decision of the Board of Contract Adjustment denying relief to claimant for depreciation in the value of the plant is affirmed.

6. Attention is invited to the fact that a loan of \$95,000 was made to claimant through the War Credits Board, upon which it appears a balance remains unpaid.

DISPOSITION.

The record, together with copy of the opinion of the Board of Contract Adjustment and of the Appeal Section, War Department Claims Board, on reconsideration will be transmitted to the Ordnance Section for appropriate action.

Lieut. Col. McKeeby and Capt. Frazer concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

DECEMBER 27, 1920.

Case No. 2106.

In re **CLAIM OF CAMBRIA STEEL CO.**

RAW MATERIALS.—This case was decided May 3, 1920, and claimant was given partial relief. An appeal was noted by the Air Service representative of the War Department Claims Board and the Secretary of War forwarded the same to this Board for further consideration. On further consideration it appeared that the raw material in question was not purchased after the receipt of the contract. Therefore all relief prayed for is denied. (For decision of May 3, 1920, see Vol. V, these decisions, p. 124.)

Maj. Farr writing the opinion of the Board.

ON RECONSIDERATION.

1. This case was decided by the Board of Contract Adjustment on the 3d day of May, 1920, and was to the effect that the claimant was entitled to be reimbursed for such loss as it suffered by reason of the termination of the contract; such loss being the amount of the depreciation in value of such proportion of the raw materials left on its hands as would have been necessary to complete its contract.

2. As the case involved a contract with the Air Service, the same was forwarded to Mr. Robert McC. Marsh, special member, War Department Claims Board, who noted an appeal from the decision of the Board of Contract Adjustment and the decision, with papers attached thereto, were accordingly forwarded to the special advisers of the Secretary of War.

3. Under date of November 1, 1920, the Secretary returned the decision with all papers with the following order:

“Upon consideration of the record here presented, it is directed that the record be returned to the War Department Claims Board for further investigation of the circumstances under which the material in question was ordered, appropriate disposition to be thereupon made in accordance with the accompanying recommendation.

“**NEWTON D. BAKER,**
“*Secretary of War.*”

4. The recommendation referred to in said order is as follows:

“As the contract here in question contains a termination clause intended to fix the mutual obligations of the parties in case of the termination of the contract by the United States in the public interest, the question here presented is whether the settlement directed by the Board is in accordance with the provisions of the termination clause.

"The portion of the termination clause here applicable directs that the United States shall reimburse the contractor—

"for such proportion of the contractor's expenditures (other than expenditures for plant, facilities, and equipment solely provided for the performance of this contract) made by the contractor in good faith in connection with the performance of this contract, as is fairly and properly apportionable to the articles or work, the delivery or performance of which is so terminated, plus 10 per cent of the amount so ascertained. Any raw materials, articles in process of manufacture, and other property so paid for shall become the property of the United States.'

"The Board in its decision allows claimant reimbursement for materials on hand at the time of termination, regardless of whether or not such materials were bought after the contract was either in effect, promised, or in contemplation. This decision is based partly on a finding that in 1917 the War Industries Board 'practically commandeered' the contractor's facilities and that the claimant during the remainder of the period of the war devoted itself almost wholly to Government work, and partly on a finding that the materials on hand at the time of suspension had been purchased by the claimant in anticipation of the Government contracts on hand at the time of the armistice.

"I do not know just what status is intended to be indicated by the Board in its finding that the plant had been 'practically commandeered,' but do not think that the record justifies a conclusion that the plant was in fact commandeered by the United States. The action of the claimant company with respect to the Government orders having been voluntary, its rights in connection with the adjustment of those orders are to be determined solely with reference to the terms of the written contracts evidencing such orders.

"Turning again, therefore, to the appropriate provisions of the termination clause in this particular contract, the question to be determined is whether the expenditures here involved are 'expenditures * * * made by the contractor in good faith in connection with the performance of the contract.' No question has been raised as to the good faith of the contractor, and if the expenditures in question were made *in connection with the performance of this contract*, they are allowable, in so far as they represent materials applicable to the uncompleted portion of the contract. The language 'in connection with the performance of this contract,' does not necessarily limit claimant to reimbursement for expenditures incurred after the formal contract was made, but it seems to me that a fair construction of this language does not include expenditures made before the contract in question was either promised or contemplated, for the purchase of the general stock of raw materials, not exceeding the amount usually carried on hand by the claimant in connection with its regular business, regardless of orders on hand. As I am not satisfied that the materials here in question were purchased either in reliance on any assurance or promise of this particular contract, or in reliance on assurances of any group or volume of Government purchases which would include the contract here in question, I recommend that approval of the decision of the Board of Contract Adjustment be with-

held, and that the claim be returned to the War Department Claims Board with instructions to further investigate the circumstances under which the material in question was ordered, and to make appropriate disposition of the claim in accordance with this memorandum.

“R. C. GOODALE,
“*Special Adviser.*”

5. Thereupon, in accordance with the foregoing order of the Secretary of War, the claimant, on the 13th day of December, 1920, was given a further hearing. Its attorney then stated his position to be:

“Now, the position that we are taking and will support by evidence is this—that all the material that we bought from the time that we were directed to devote our energies to war work, which was, say, September 1, 1917, until after the armistice, which was, say, November 30, 1918, was bought for Government uses in accordance with direct contracts with the Government or orders received from the Government or Government directions that the material should be supplied to Government agencies.

“The evidence already in shows that the stock on hand at the time when Mr. Replogle, who was the director of steel supplies, took charge of the allocation of its products, was all consumed by January 1, 1918, and that therefore all the purchases made thereafter, from January 1, 1918, of material necessary to fabricate Government orders, if it be the fact, as has been established, and that all of our products, to the extent of 95 per cent, were devoted to war work and were bought for Government contracts.” (Tr. p. 137–138.)

6. Claimant produced its assistant auditor, Mr. Fred H. Overdorf, as its chief witness, who testified along the lines outlined by claimant's attorney in his opening statement and submitted certain detailed statements of orders received from various Government bureaus and of certain materials purchased necessary to complete certain orders received for Government work.

DECISION.

1. All of the evidence produced by the claimant at the hearing on December 13, 1920, was to the effect that, as claimant was doing Government work to what it claimed was 95 per cent of its capacity, all materials purchased by it after January 1, 1918, were for the performance of Government contracts, and that therefore, upon the suspension or cancellation of any contract given it after that date, any material left on hand that would have been used in the performance of any such suspended contract should be considered as a commitment made on account of the said contract, and upon the said suspension claimant should be allowed the difference between the cost of the materials so purchased and the value of the same after the armistice.

2. This is a position that the Board does not concur in, as it believes that the claimant is only entitled, under any circumstances, to be reimbursed for any commitment made by it after the contract in question was given to it, or it was advised that it had a contract.

3. This contract or order was dated the 9th day of October, 1918, and was suspended by the Government on the 23d day of December, 1918, after 335,300 pounds had been delivered, so that any allowance or payment that this Board could recommend to the claimant would have to be for materials purchased after the 8th day of October, 1918, and prior to the 23d day of December, 1918. As only one witness was introduced by claimant, it is necessary for us to quote some of his evidence:

"QUESTION. Well, I will ask another question: After receipt of this order dated October 9, 1918, did you then order any material necessary to fulfill that order?

"Mr. OVERDORF. We ordered material after that date, which became a part of our general stock of raw materials, from which we would draw to fulfill this order.

"QUESTION. Do I understand your answer to be that you did order materials after October 9, 1918?

"Mr. OVERDORF. After October 9, 1918, we would have placed orders for materials.

"QUESTION. But did you—not what you would have done? Did you do it?

"Mr. OVERDORF. Not specifically for that order.

"QUESTION. If you had never received the order of October 9, 1918, would you not have had on hand the same material that you are now asking payment for?

"Mr. WINTERSTEEN. What is your answer to that, Mr. Overdorf?

"Mr. OVERDORF. Well, I can not say that a small order for 600 tons would or would not influence the orders placed for raw materials necessary to produce 100,000 tons of steel a month.

"QUESTION. Then, do I understand your answer to be that even though you never had received this contract, the material for which you now claim would nevertheless be on hand?

"Mr. OVERDORF. We must remember that in case of this particular order we did make some shipments and used material.

"QUESTION. I will ask the question again: Suppose that you had never gotten the contract or the order of October 9, 1918, would you not have had on hand the very material that you are now asking that you be paid for on account of the cancellation or the suspension of the order of October 9, 1918?

"Mr. OVERDORF. We probably would have." (Tr. pp. 162-164.)

4. From the foregoing admissions and a careful examination of the evidence produced at the previous hearing, on which the decision of May 3, 1920, was based, this Board is of the opinion that the claimant has failed to prove that the material for which it is now asking that the Government should make it an allowance on account of its depreciation was ordered by it subsequent to the 8th day of

October, 1918, or for the purpose of fulfilling the order in question. Since claimant has failed to show that the materials in question were purchased on the faith of the order of October 9, 1918, it is entitled to no relief.

5. For the foregoing reasons all relief asked for by the claimant is denied.

DISPOSITION.

A final order denying relief will issue.

Lieut. Col. McKeeby and Capt. Sheppard concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

DECEMBER 28, 1920.

Case No. 2792.

In re **CLAIM OF CAMBRIA STEEL CO.**

REIMBURSEMENT.—Where claimant had a contract with the United States Government to furnish 6,400 tons of steel and, in furnishing same, delivered to, and the Government accepted, 72,300 pounds of steel in excess of the amount called for in the contract, the Government is obligated to reimburse claimant for the said excess shipment of steel at the rate specified in the contract of December 1, 1917, under which contract the shipments in question were made.

This case was decided by this Board on October 13, 1920, and claimant, not being satisfied with same, asked for a reconsideration, which was granted. For statement of facts, see Decision of the Board dated October 13, 1920 (Vol. VII, p. 915.)

Maj. Farr writing the opinion of the Board.

**ON RECONSIDERATION AND IN SUPPLEMENT TO DECISION OF OCTOBER
13, 1920.**

1. This claimant originally presented its petition to this Board, on which it was granted a hearing and a decision rendered on the 13th day of October, 1920, which decision granted claimant certain relief as therein set forth, and to which decision reference is now made for a full discussion of all the facts material thereto.

2. The evidence produced at that time before the Board established the fact that claimant had delivered to the United States Government, and the United States Government had accepted at its plant at Middletown, Ohio, approximately 72,300 pounds of steel in excess of the amount called for under the contract of December 1, 1917, between the said Cambria Steel Co. and the United States Government, and that the claimant had not been reimbursed or paid for the steel delivered to the Government in excess of the amount called for under the said contract.

DECISION.

1. In view of the fact that the United States Government accepted an excess shipment of approximately 72,300 pounds of steel over and above the 6,400 tons of 6½-inch round common shell steel billets, and the same has been used by the United States Government, and claimant has never been reimbursed for the same, it is the opinion

of this Board that claimant should be paid the contract price for all steel shipped to, accepted, and used by the United States Government in excess of the 6,400 tons called for under the provisions of the said contract, and that, in addition thereto, as more fully set forth in paragraph 6 of the decision rendered by this Board under date of October 13, 1920, claimant should also be reimbursed for at least 50 per cent of the amount of the rejected materials, which is the amount it had heretofore agreed upon as being a fair settlement of its claim, and that in addition to that it is entitled to the freight on the same proportion of the rejected steel returned to it from the plant at Middletown, Ohio.

DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Claims Board, Ordnance Department, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage, and Traffic Division.

Lieut. Col. McKeeby and Capt. Sheppard concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

DECEMBER 28, 1920.

Case No. 2532.

In re **CLAIM OF FRED G. CLARK CO.**

1. CLAIM AND DECISION.—This claim was decided by the Board of Contract Adjustment May 12, 1920, relief being granted and an award being issued. The vice chairman of the War Department Claims Board addressed a memorandum to the Judge Advocate General requesting an opinion as to the legality of the award. The Judge Advocate General returned the memorandum by first indorsement, holding that no legal remedy existed for the loss alleged by claimant and that therefore no valid award could be made. The claim was returned to the Appeal Section and a decision was rendered vacating the former decision of the Board of Contract Adjustment of May 12, 1920, and denying claimant any relief. (For findings of fact, see former decision of the Board of Contract Adjustment, May 12, 1920, Vol. V, p. 329, these decisions.)

Maj. Blackburn writing the opinion of the Board:

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. The Board of Contract Adjustment rendered a decision in this case of date May 12, 1920, granting claimant relief, and an award was issued thereon. Under date of October 26, 1920, the vice chairman of the War Department Claims Board, having doubt as to the legality of this action of the Board of Contract Adjustment, addressed a memorandum to the Judge Advocate General requesting an expression as to the validity of the proposed award.

2. On December 2, 1920, the Judge Advocate General returned the memorandum of the vice chairman of the War Department Claims Board by first indorsement, holding, in effect, that no legal remedy existed for the loss asserted by claimant in this case and that, therefore, no valid award could be made.

3. The record has been returned to the Appeal Section by the vice chairman of the War Department Claims Board for further consideration and appropriate action.

DECISION.

1. This is one of the so-called wool-grease cases. The facts fully appear in the decision of the Board of Contract Adjustment, May 12, 1920 (Vol. V, p. 326, these decisions).

2. In the case of the Virginia Red Oil Products Co., 150-C-2779, a wool-grease case, in which the facts were substantially the same as in this case, the Secretary of War, on December 14, 1920, entered a final order confirming the decision of the Appeal Section, War Department Claims Board, and denying claimant any relief.

3. In view of the opinion of the Judge Advocate General in the instant case and of the decision of the Secretary of War in the case of the Virginia Red Oil Products Co., the decision of the Board of Contract Adjustment in this case, of date May 12, 1920, is vacated, set aside, and held for naught, and the usual final order denying relief will be entered herein.

DISPOSITION.

A final order denying relief will issue.

Lieut. Col McKeeby concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

DECEMBER 28, 1920.

Case No. 3041.

In re **CLAIM OF THE SUTTON CHEMICAL CO.**

- 1. FORMAL CONTRACT—SUPPLEMENTAL SETTLEMENT CONTRACT.**—Where the claimant and the Government have entered into a formal supplemental settlement contract, for a specific sum to be paid upon the performance of certain acts by both claimant and the Government and the said acts have been performed by both parties, the Government is bound by the terms of the contract as executed in same manner as an individual.
- 2. FRAUD AND MISTAKE.**—Where there is no evidence of fraud or mistake the provisions of the contract govern, and the Government can not withhold part payment of the agreed settlement by reason of the arising of certain contingencies that might have been foreseen but were not provided for in the settlement contract, the said contingencies having later presented themselves and the Government paying for the same, as they were not provided for in the instrument at the time of execution.

Lieut. Col. Smith writing the opinion of the Board.

FINDINGS OF FACT.

1. This case arises under General Order 103, War Department, 1918, and is an appeal from a decision of the War Department Claims Board, Air Service Section, disallowing in part a claim for balance due in payment to claimant under a supplemental settlement contract heretofore entered into.

2. The claim arises under formal contract No. 3549-A, Order No. 168, Bureau of Aircraft Production, dated 12th day of December, 1918, which contract relates to a settlement of then existing contracts Nos. 3549, Order No. 171, and 3551, Order No. 168, dated April 15, 1918, duly executed by and between the Government and claimant company.

3. The supplemental settlement contract No. 3549-A provides for the payment to claimant of \$187,500, less such payments as have already been made to or for the contractor on account of the original contracts Nos. 3549 and 3551.

4. At the time the supplemental settlement contract was made, the Government had paid to, or for the contractor, \$72,580.84, leaving the amount due claimant under the contract \$114,919.16, of which amount \$100,000 was paid to contractor on December 28, 1918, the balance of \$14,919.16 being withheld. This amount was withheld by the dis-

bursing officer in order to pay numerous items of freight on material and supplies used in the construction and erection of the plant under the contracts adjusted by the settlement contract. The amount of the freight had not been ascertained, and was not taken into consideration at the time of the execution of the settlement contract.

5. An audit has since been made and public vouchers issued to various transportation companies in payment of these charges, and it is insisted that these amounts should be charged against the amount so withheld, thus, according to the Government's contention, leaving a balance due claimant of only \$5,074.06 instead of \$14,919.16, as contended by claimant.

DECISION.

1. The determination of the rights and obligations of the parties depends upon the construction of the formal settlement contract No. 3549-A, which, in so far as material to the controversy, provides:

"ARTICLE I. The parties hereto expressly agree hereby that the execution of this present contract shall, ipso facto, suspend, terminate, and cancel said contracts Nos. 3549 and 3551, together with any and all rights, obligations, claims, and demands whatsoever thereunder or growing thereout, and that this present contract shall provide for and constitute a full and final settlement of all rights, obligations, claims, and demands of either party against the other and of all questions under or growing out of said contracts Nos. 3549 and 3551.

"ARTICLE II, SEC. (1). The Government shall forthwith pay unto the contractor the net difference between (a) \$187,500 and (b) the total of such sums as the Government has heretofore paid to or for the contractor on account of contracts Nos. 3549 and 3551 or either of them.

"ARTICLE II, SEC. (2). As soon as the same can be conveniently done, the contractor shall produce and deliver to the Government such evidence as shall satisfy the Government that the contractor has in fact paid and/or satisfied all legally binding debts, claims and/or obligations incurred or contracted by it in connection with said contracts Nos. 3549 and 3551 or either of them.

"ARTICLE II, SEC. (3). Upon the production by and receipt from the contractor of such evidence, the Government shall forthwith convey unto the contractor, by proper instrument of conveyance, its right, title, and interest in and to the said partially completed plant and the tract of land upon which same is erected.

"ARTICLE III, SEC. (1). The contractor, for itself, its successors and/or assigns, hereby expressly remises, releases, and forever discharges the Government of and from all and all manner of debts, obligations, rights of action, claims, and demands whatsoever, due or to become due, either at law or in equity, under or by reason of or growing out of the hereby canceled contracts Nos. 3549 and 3551 or either of them."

2. The settlement contract is binding both upon claimant and the Government. The settlement can not be reconsidered, except upon

a showing of fraud or mutual mistake. There is nothing in the record tending to show either. If the Government had desired to protect itself against the contingency from which it now contends it is entitled to withhold the amount in dispute, it should have done so by suitable provisions in the contract. We are not concerned with the Government's failure in this regard. This Board did not make the contract, nor can it remake it. It can only construe the contract.

The contract in terms provides that claimant is entitled to payment of \$187,500, less such payments as have already been made to or for the contractor on account of the contracts adjusted by the settlement contract. This provision plainly refers to payments that had been made previous to the time the settlement contract was executed. There is nothing in the contract which in any way protects the Government from contingencies arising through the payment of freight by it. Under such circumstances it must be held that claimant is entitled to payment according to the terms of the contract and not in accordance with a contract that might or should have been written, but was not executed.

The Government has complied, on its part, with the terms of the contract providing for the transfer of the partially completed plant and the land upon which the plant is situate. Claimant has accepted the transfer and, therefore, it is entitled to payment from the Government of the sum of \$187,500, less such payments as the Government had made to or for the account of claimant under original contracts Nos. 3549 and 3551, prior to the 12th day of December, 1918, the date of the settlement contract, as by making the transfer the Government must be held to have been satisfied that section (2) of Article II of the settlement contract had been complied with—a prerequisite to the conveyance.

DISPOSITION.

The War Department Claims Board, Appeal Section, hereby transmits its decision to the War Department Claims Board, Air Service Section, for appropriate action.

Lieut. Col. McKeeby and Capt. Frazer concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

DECEMBER 30, 1920.

Case No. 3037.

In re **CLAIM OF WINCHESTER REPEATING ARMS CO.**

1. **JURISDICTION.**—The Secretary of War will not assume jurisdiction to make adjustment of a claim arising under formally executed cost-plus contracts completed by full performance, no doubts or disputes arising as to the meaning of anything in the contracts and no special or unusual reason appearing which would require assuming jurisdiction by the Secretary of War.

Maj. Blackburn writing the opinion of the Board.

FINDINGS OF FACT.

1. This case properly arises under General Order 103, War Department, 1918, and comes to the Appeal Section, War Department Claims Board on appeal from the Ordnance Section disallowing the claim. The claim, amounting to \$693,526.88, is for amortization of buildings, equipment, and machinery used in the performance of certain ordnance contracts with the United States Government and has been assigned for decision on the record as made up.

2. The circumstances under which the claim arises are as follows: Claimant had eight cost-plus formally executed contracts with the United States; as follows:

P14172-2370SA, for 50,000,000 .30-caliber cartridges, reduced to 1,167,300. This contract was completed by full performance.

P6176-1461SA, for 3,340,000 .30-caliber cartridges. This contract was completed by full performance.

P14204-2375SA, for 10,000,000 .30-caliber cartridges, reduced to 3,533,660. This contract was completed by full performance.

P7388-1564SA, for 100,000 .45-caliber Colt pistols, suspended December 4, 1918, no work having been done on this contract.

14675, for 4,640,000 .30 caliber cartridges. This contract was completed by full performance.

14067, for 245,000,000 .30-caliber cartridges. This contract was completed by full performance.

14627, for 92,840,000 .30-caliber cartridges, was completed by full performance and this contract was issued as a supplemental contract to 14067, increasing the number of cartridges called for by that contract.

The quantity produced under both contracts was 337,840,000.

14064, for the manufacture of model 1917 rifles, had a number of supplemental contracts calling for bayonets, spare parts, etc. Most of these supplemental agreements were completed, but some of them were terminated by suspension.

3. It does not appear from the statement of claim whether or not there has been any settlement between the claimant and the Govern-

ment of the contracts enumerated in paragraph 2. All the items for which claim is now made are proper subjects for consideration and adjustment in connection with the settlement of each of the contracts. It does not appear from the statement of claim or any evidence appearing in the record that the buildings, machinery, and equipment were acquired by the claimant for use in the performance of these particular contracts. Nor does it appear that the facilities for which amortization is asked were contemplated by either the contractor or the Government at the time of entering into the contracts or during the negotiations leading up to the execution of the contracts.

4. On October 28, 1920, the vice chairman of the War Department Claims Board wrote counsel for claimant requesting the submission of a written brief in support of the claim. No such brief has been received by this Board.

DECISION.

1. An oral argument is thought unnecessary in this case, in view of the fact that this Board has repeatedly declined to take jurisdiction for the purpose of making adjustment of formally executed contracts completed by full performance. Whatever rightful claim claimant may have as growing out of any of the contracts enumerated in paragraph 2 of the findings of fact, is a matter which may properly be adjusted and settlement made under the contracts by the Auditor for the War Department. It appears from the following statement in the letter of November 18, 1920, to the vice chairman of the War Department Claims Board from counsel for claimant that he regards the claim purely as one arising under the contracts, viz:

"I beg particularly to call your attention to the provisions of the contracts which were filed as exhibits to the claim. The examination of these discloses that the Winchester Co. had a contractual right to 'a reasonable allowance according to the conditions for depreciation of value of plant and property.'"

2. The claim not being one coming within the purview of the act of March 2, 1919 (the Dent Act), and no doubts or disputes arising as to the meaning of anything in the contracts, and no unusual or special reason appearing which would require assuming jurisdiction by the Secretary of War to make adjustment of the instant claim, relief will accordingly be denied.

DISPOSITION.

Final order denying relief will issue.

Lieut. Col. McKeeby and Capt. Marcum concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

JANUARY 6, 1921.

Case No. 2905.

In re **CLAIM OF LESSER & STENGE.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

(For decision of Appeal Section, War Department Claims Board, see Vol. VII, these decisions, p. 931.)

Upon consideration of the record and appeal in the above-entitled case, the decision of the Appeal Section, denying relief, is affirmed.

NEWTON D. BAKER,
Secretary of War.

JANUARY 6, 1921.

Case No. 3006.

***In re* CLAIM OF THE MESTA MACHINE CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

The Appeal Section, War Department Claims Board, rendered a decision in this case November 12, 1920, granting claimant partial relief. On appeal to the Secretary of War this decision was affirmed. (See Vol. VIII, these decisions, p. 151.)

Upon consideration of the appeal and record in this case, the decision of the Appeal Section, War Department Claims Board, is affirmed.

NEWTON D. BAKER,
Secretary of War.

JANUARY 7, 1921.

Case No. 1970.

In re CLAIM OF THE GAS OIL CHEMICAL CO.

ON APPEAL BEFORE THE SECRETARY OF WAR.

CLAIM AND DECISION.—On March 22, 1920, the Board of Contract Adjustment issued a decision disallowing claimant's entire claim. Upon recommendation of the standing committee on rehearings, a rehearing was had, and, on July 30, 1920, the Appeal Section, War Department Claims Board, rendered a decision holding that claimant was entitled to an adjustment of its contract in accordance with the supply circulars, but that the principal items of the claim must be denied. Claimant then appealed to the Secretary of War, who, on January 7, 1921, directed that the decision of the Appeal Section be vacated and further proceedings had in conformity with paragraph 9 of the memorandum of the Vice Chairman, War Department Claims Board. (For prior decisions, see Vol. IV, p. 542, and Vol. VII, p. 155.)

Upon consideration of the appeal and record in the foregoing case I direct that the decision of the Appeal Section of July 24, 1920, be vacated and that further proceedings be had in conformity with paragraph 9 of the memorandum of the vice chairman, War Department Claims Board.

NEWTON D. BAKER,
Secretary of War.

MEMORANDUM FOR THE SECRETARY OF WAR.

1. In May, 1918, this company entered into a formal contract to furnish the Government a large quantity of toluol. The contract was suspended after the armistice. Included in the claim are items for reimbursement for money spent for special facilities and for raw materials on hand at the suspension of the contract. The Appeal Section on July 24, 1920, disallowed both of the above items. Claimant has confined this appeal to these two items.

2. The history of the case is that in a previous decision of March, 1920, the Board of Contract Adjustment had found that the claimant was in default under its contract. The claimant asked for a rehearing, and as the result of this rehearing the Appeal Section handed down the decision of July 24, 1920, which is the decision now before you. In this latter decision of July 24 it was held that

the claimant was not in default. After so deciding, the Appeal Section then disallowed the item for money spent for special facilities, on the ground that the claimant had ample facilities for the contract at the time the contract was negotiated; and the item for oil on hand at the suspension of the contract, on the ground that the oil on hand was not suitable for the contract.

3. The claimant bases its appeal upon the contention: First, that it has been surprised by reason of the Appeal Section passing on the items in question, as the claimant distinctly understood that the issue at the rehearing was on the question of default; second, that the findings on the items in question were contrary to the evidence, and that the claimant has evidence not introduced before the board which will show that at the time the contract was entered into the facilities of the claimant were not sufficient to enable it to perform the Government contract, and that the raw material for which it claims reimbursement was on hand as the result of an arrangement with the Government.

4. To support its contention of surprise the claimant has quoted evidence taken at the rehearings going to show that the Appeal Section did not intend to hear evidence on the items that have been disallowed. The claimant alleges that its witnesses were present in Washington when the rehearings were had, and were prepared to go thoroughly into every detail of the claim, but that in view of statements of the chairman and members of the board of review of the Appeal Section, made both formally and informally, the claimant offered no evidence in support of the items of its claim, but contented itself with rebutting the charge that it should be treated as in default under the terms of the contract. While the evidence as to surprise does not entirely convince me, I have no hesitation in stating that it has raised in my mind a serious doubt whether the claimant understood that he might introduce evidence upon the merits of the items in question. In my opinion the claimant should be given the benefit of the doubt, and allowed a rehearing before the Appeal Section, with an opportunity to introduce evidence as to the two items above referred to.

5. According to the present brief of claimant his plant at the time of signing of the contract, May 14, 1918, had a capacity of 200 gallons of toluol per day. It is shown from the record that only one delivery of a little over 3,000 gallons in the month of August, 1918; the program under the contract called for the delivery of not less than 10,000 gallons per month. It is shown by the evidence that the contractor had raw material at one time sufficient to cover at least one-third of the contract quantity of 100,000 gallons of toluol; in the claim of the contractor he seeks to recover from the Government for certain quantities of unused material. As late as September 3,

1918, Maj. E. G. Pratt, president of the company, wrote a letter to Washington, stating:

"We are not in immediate need of this product (crude light oil) but may be at the expiration of 30 days if we are unable to pick up a sufficient supply in this locality to keep our plant going at maximum capacity."

6. This indicates that the contractor for at least a period of five months, May, June, July, August, and September was not hampered in deliveries for the want of raw material; and, yet, when the armistice was signed, it had only made one delivery representing about two weeks' run.

7. The failure of the contractor to manufacture toluol and to use up available supplies of crude oil during the six months previous to the suspension of the contract is not at all clearly or satisfactorily explained in the evidence adduced in the record as it stands; it could be inferred that the plant and process was to blame or that the management and employees were inefficient and incapable or that the Blau-gas treatment of the crude oil extracted the toluol. In the latter event cancellation of contract and suit against the Blau Gas Co. was the proper action. Certainly this inferior commodity chocking up the plant could not be held on hand and its cost borne by the United States. These doubts should be cleared up by positive testimony so that a decision can be made in this case that will rest upon a sound basis of fact, which is now one of doubt and confusion.

When the increased facilities were installed and their nature and cost, are not clearly shown. It would appear that some of them were started in August when the company found itself in difficulties with the existing plant and the supply of crude oil from Minneapolis. It is also questionable whether any payment for such alleged facilities is proper but that is a matter that can safely be left to the Appeal Section for its consideration.

9. I, therefore, recommend that the decision of the Appeal Section in this case be vacated, and that the papers be returned to that section to give claimant opportunity to present such evidence as he may have material to his claim; that after full hearing the case be decided by the Appeal Section independently of former decisions or the action on this appeal.

J. A. HULL,

Vice Chairman War Department Claims Board.

JANUARY 8, 1921.

Case No. 2778.

***In re* CLAIM OF THE SYMINGTON CHICAGO CORPORATION.**

For statement of facts and decision, see Vol. VII, p. 205.

ON APPEAL BEFORE THE SECRETARY OF WAR.

On consideration of the appeal and record in this case the decision of the Appeal Section, War Department Claims Board, is affirmed.

**NEWTON D. BAKER,
*Secretary of War.***

JANUARY 11, 1921.

Case No. 2512.

***In re* CLAIM OF THE SYMINGTON MACHINE CORPORATION.**

(For decision of Board of Contract Adjustment, see Vol. VII, p. 439.)

ON APPEAL BEFORE THE SECRETARY OF WAR.

Upon consideration of the appeal and record in the foregoing case, I am convinced that the decision of the Board of Contract Adjustment is correct and the same is hereby affirmed.

It is further instructed that the papers be referred to the Chief of Finance for further action.

NEWTON D. BAKER,
Secretary of War.

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JANUARY 15, 1921.

Case No. 2752.

In re **CLAIM OF MACON, DUBLIN & SAVANNAH R. R. CO.**

This claim was decided by the Appeal Section adversely to claimant on July 19, 1920. (For statement of facts and decision, see Vol. VII, p. 69.)

ON APPEAL BEFORE THE SECRETARY OF WAR.

Upon consideration of the appeal and record in this case, the action of the Appeal Section, War Department Claims Board, denying relief, is affirmed.

NEWTON D. BAKER,
Secretary of War.

JANUARY 15, 1921.

Case No. 2199.

In re **CLAIM OF OXFORD MANUFACTURING CO.**

**For decision of Board of Contract Adjustment, see Vol. III, these decisions,
p. 533.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

Upon consideration of the appeal and record in the above case I am convinced that the decision of the Board of Contract Adjustment denying relief is correct.

NEWTON D. BAKER,
Secretary of War.

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JANUARY 15, 1921.

Case No. 2446.

***In re* CLAIM OF SELDEN BRECK CONSTRUCTION CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

The decision of the Board of Contract Adjustment denying relief in above case was rendered May 23, 1920. (See Vol. V, these decisions, p. 708.)

Upon consideration of the appeal and record in the foregoing case the decision of the Board of Contract Adjustment denying relief is affirmed.

NEWTON D. BAKER,
Secretary of War.

JANUARY 15, 1921.

Case No. 2626.

***In re* CLAIM OF THE SEABOARD AIR LINE RAILROAD CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

This claim was decided by the Appeal Section, War Department Claims Board, on July 15, 1920, by affirming the decision of the Transportation Claims Board denying relief. (For statement of facts and decision, see Vol. VII, p. 38.)

Upon consideration of the appeal and record in this case the action of the Appeal Section, War Department Claims Board, denying relief is approved.

**NEWTON D. BAKER,
*Secretary of War.***

JANUARY 19, 1921.

Case No. B. C. A. Sales—8.

In re **CLAIM OF LEWIS S. WANDELL & CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

For statement of facts and decision of Board of Contract Adjustment, see Vol. VI, these decisions, p. 415.

Upon consideration of the appeal and record in the foregoing case I am convinced that the action of the Board of Contract Adjustment holding that the Secretary of War is without power to adjust a claim for liquidated damages predicated upon the alleged breach of informal contracts not within the Dent Act is correct. The decision is therefore affirmed.

NEWTON D. BAKER,
Secretary of War.

JANUARY 19, 1921.

Cases Nos. 686 and 2304.

In re CLAIMS OF THE PENTUCKET NARROW FABRIC MILLS,

ON APPEAL BEFORE THE SECRETARY OF WAR.

See Vol. VI, these decisions, pp. 774 and 781.

Upon consideration of the record in the foregoing cases the decision of the Board of Contract Adjustment is affirmed.

NEWTON D. BAKER,
Secretary of War.

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JANUARY 20, 1921.

Case No. 2621.

In re CLAIM OF THE WOOL GROWERS' CENTRAL STORAGE CO.

(For decision of Appeal Section, War Department Claims Board, see Vol. VII.
p. 483.)

ON APPEAL BEFORE THE SECRETARY OF WAR.

Upon consideration of the appeal and record in the foregoing case the decision of the Appeal Section, War Department Claims Board. denying relief is affirmed.

NEWTON D. BAKER,
Secretary of War.

JANUARY 20, 1921.

Case No. 2226.

***In re* CLAIM OF MARSH MANUFACTURING CO.**

This claim was decided by the Board of Contract Adjustment on February 25, 1920, relief being granted in part. (For statement of facts and decision, see Vol. III, p. 994, and for final order issued in accordance with decision of Secretary of War, see Vol. VIII, p. 402.)

ON APPEAL BEFORE THE SECRETARY OF WAR.

Upon consideration of the appeal and record in the above-entitled case, and understanding that claimant desires to take this case to the Court of Claims, I direct that an order be entered denying all relief.

**NEWTON D. BAKER,
*Secretary of War.***

JANUARY 22, 1921.

Case No. 2226.

In re CLAIM OF MARSH MANUFACTURING CO.

(See Vol. III, p. 994, and Vol. VIII, p. 401.)

FINAL ORDER DENYING RELIEF.

The Board of Contract Adjustment of the War Department having considered the claim of the Marsh Manufacturing Co., Vincennes, Ind., No. 150-C-2226, and having rendered a decision thereon on the 25th day of February, 1920, granting relief to the extent of \$1,725 only and denying relief as to all other items of said claim, and claimant having appealed from said decision of the Board of Contract Adjustment to the Secretary of War, and the Secretary of War having considered said appeal and record, and having on January 20, 1921, signed an order directing that an order be entered denying all relief on said claim, the Appeal Section, War Department Claims Board, does therefore, in conformity with said order of the Secretary of War, hereby vacate said decision of the Board of Contract Adjustment rendered on February 25, 1920, and the relief asked for in said claim is hereby denied.

GEO. L. McKEEBY,
Lt. Colonel, Judge Advocate, Chairman.
E. E. FUSSELL,
Recorder.

JANUARY 28, 1921.

Case No. 2869.

In re CLAIM OF THE ALUMINUM CASTINGS CO.

ON APPEAL BEFORE THE SECRETARY OF WAR.

(For statement of facts and decision of Appeal Section in above case, see Vol. VII, p. 967.)

Upon consideration of the appeal and record in the above-mentioned case, I am convinced that the action of the Appeal Section denying relief is correct and the same is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

403

JANUARY 28, 1921.

Case No. 3043.

In re **CLAIM OF THE FITZGERALD CONSTRUCTION CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

On appeal to the Secretary of War the decision of the Appeal Section, War Department Claims Board, denying relief was affirmed. (See Vol. VIII, p. 349.)

Upon consideration of the appeal and record in the above-entitled case, I am convinced that the decision of the Appeal Section, War Department Claims Board, is correct and the same is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

JANUARY 28, 1921.

Cases Nos. 1719 and 1720.

In re **CLAIM OF MORGAN ENGINEERING CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

These cases were decided by the Appeal Section adversely to claimant on August 27, 1920. (For statement of facts and decision, see Vol. VII, p. 475.)

Upon consideration of the appeal and record in the foregoing case, the decision of the Appeal Section, War Department Claims Board, is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

405

JANUARY 28, 1921.

Case No. 1248.

In re **CLAIM OF MUELLER METALS CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

This claim was decided adversely to claimant by the Board of Contract Adjustment on June 30, 1920. On appeal to the Secretary of War the decision of the Board of Contract Adjustment was affirmed. (For statement of facts and decision, see Vol. VI, these decisions, p. 648.)

Upon consideration of the appeal and record in the above-entitled case, I am convinced that the decision of the Board of Contract Adjustment denying relief is correct and the same is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

JANUARY 28, 1921.

Case No. 2834.

In re **CLAIM OF THE MUELLER METALS CO.**

Upon appeal to the Secretary of War, the decision of the Appeal Section, War Department Claims Board, dated September 29, 1920, was affirmed. (See Vol. VII, p. 700.)

ON APPEAL BEFORE THE SECRETARY OF WAR.

Upon consideration of the appeal and record in the above-entitled case, I am convinced that the decision of the Appeal Section, War Department Claims Board, is correct, and the same is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

JANUARY 31, 1921.

Cases Nos. 2993, 2994, and 3000.

In re **CLAIM OF WALKER M. LEVETT CO.**

(For decision of Appeal Section, War Department Claims Board, in above cases,
see Vol. VII, pp. 957, 961, 965.)

ON APPEAL BEFORE THE SECRETARY OF WAR.

Upon consideration of the appeal and record in the above-entitled cases, I am convinced that the decision of the Appeal Section denying relief is correct and is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

FEBRUARY 5, 1921.

Case No. 697.

***In re* CLAIM OF UNITED STATES BEDDING CO.**

This claim was disposed of by the Board of Contract Adjustment March 8, 1920, relief being denied. On appeal to the Secretary of War this decision was affirmed. (For statement of claim and decision, see Vol. IV, these decisions, p. 325.)

ON REHEARING BEFORE THE SECRETARY OF WAR.

This case is presented to me for orders, and upon consideration of the entire record I am convinced that the action of the Board of Contract Adjustment denying relief is correct and that decision is therefore affirmed.

NEWTON D. BAKER,
Secretary of War.

FEBRUARY 8, 1921.

Case No. 342.

In re **CLAIM OF WAR CRETE SPIPBUILDING CO.**

The Board of Contract Adjustment decided this case adversely to claimant June 19, 1920, and on appeal to the Secretary of War this decision was affirmed. (See Vol. VI, these decisions, p. 963.)

ON APPEAL BEFORE THE SECRETARY OF WAR.

Upon consideration of the appeal and record in the above-entitled case, I am convinced that the decision of the Board of Contract Adjustment denying relief is correct, and the same is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

FEBRUARY 15, 1921.

Case No. 1830.

In re CLAIM OF LAYMAN PRESSED ROD CO. (Inc.)

This claim was decided by the Appeal Section, War Department Claims Board, adversely to claimant on July 22, 1920. (See Vol. VII, p. 82.)

ON APPEAL BEFORE THE SECRETARY OF WAR.

Upon consideration of the appeal and record in the above-entitled case I am convinced that the decision of the Appeal Section, War Department Claims Board, is correct, and the same is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

FEBRUARY 25, 1921.

Case No. 3035.

***In re* CLAIM OF THE HOLT MANUFACTURING CO.**

This case was decided by the Appeal Section, War Department Claims Board, January 29, 1921, relief being denied in part. On appeal to the Secretary of War the decision of the Appeal Section was affirmed. (See Vol. VIII, p. 535.)

ON APPEAL BEFORE THE SECRETARY OF WAR.

Upon consideration of the record and appeal in the above-entitled case I am convinced that the decision of the Appeal Section is correct in denying relief, and the same is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

FEBRUARY 26, 1921.

Cases Nos. 2881 and 2884.

In re **CLAIMS OF THE LONG ISLAND RAILROAD CO., CAMP UPTON.**

These claims were decided by the Appeal Section, War Department Claims Board, October 22, 1920, relief being denied. (For this decision, see Vol. VII, p. 987.)

ON APPEAL BEFORE THE SECRETARY OF WAR.

Upon consideration of the record and appeal in the above-entitled cases I am convinced that the decision of the Appeal Section denying relief is correct, and the same is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

JANUARY 3, 1921.

Case No. 3046.

In re CLAIM OF R. BOYD BURLEIGH.

1. **IMPLIED AGREEMENT.**—Where Government officers authorized a privately owned automobile to be used in the Government service, and the automobile was so used, there is an implied agreement created whereby the United States is obligated to reimburse the owner thereof for such amount which the owner has necessarily expended in the upkeep of the automobile for that period of time it was so used.
2. **CLAIM AND DECISION.**—Claim for \$324 arises under the act of March 2, 1919, for the use of a privately owned automobile in the Government service. Held, claimant entitled to relief.

Maj. Blackburn writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of Congress of March 2, 1919. Statement of claim, Form B, has been filed pursuant to Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$324, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The claim was transmitted by the Ordnance Section, War Department Claims Board, to the Appeal Section, War Department Claims Board, by letter of transmittal under date of December 9, 1920. No hearing being considered necessary, this matter has been submitted to a committee of this Board for consideration and decision without hearing.

3. From the various papers and affidavits contained in the file we find the following to be the facts:

On September 24, 1918, claimant entered the employ of the United States and was assigned to duty with the Ordnance Department as traveling production representative in the Wilmington zone of the Philadelphia ordnance district with headquarters at Philadelphia, Pa.

4. In this zone there were approximately 40 plants engaged in manufacturing commodities and supplies for the Army. In order that claimant might handle this particular line of work in an expeditious manner the services of an automobile were necessary. For this work there was no Government-owned vehicle available. Claim-

ant was authorized by Mr. William Völlmer, production chief at the Philadelphia district ordnance office, to use his own machine in this work. In addition to this authorization, claimant was advised that he would be properly reimbursed therefor by the Government.

5. Upon the faith of this authorization and the repeated assurances that he would be reimbursed the expenses so incurred in the operation of his machine, claimant used his machine on Government business for 81 days during the period from September 24, 1918, to February 24, 1919.

6. The instant claim is for compensation for expenses incurred in and about the use of the automobile at the rate of \$4 per day, and includes gasoline, oil, tubes, tires, and ordinary repair and garage rentals for this period.

In an affidavit of Mr. William Vollmer, filed in connection with the instant case, he states in effect that the claimant was authorized and instructed to use his own privately owned machine on Government business in connection with his duties as traveling production representative of the Philadelphia ordnance district, and that whatever legitimate expenses were incurred by such use would be paid by the United States.

DECISION.

1. From the foregoing facts we are of the opinion and so hold that the authorization by Mr. William Vollmer, production chief of the Philadelphia district zone officer, to the claimant to use his privately owned automobile in and about the Government services created a contract within the meaning of the act of Congress approved March 2, 1919, whereby the United States is obligated to pay the claimant in the instant case such amount which claimant necessarily expended in and about the use and operation of the automobile on Government business between September 24, 1918, and February 24, 1919.

2. Claimant will be granted relief upon satisfactory proof submitted to the Ordnance Section of the items and amounts actually and necessarily incurred by claimant in connection with the use and operation of the automobile on Government business during the period of time from September 24, 1918, to February 24, 1919.

DISPOSITION.

The War Department Claims Board, Appeal Section, will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate Form "C" to the Ordnance Section, War

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Department Claims Board; for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Lieut. Col. McKeeby and Capt. Marcum concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

JANUARY 3, 1921.

Case No. 2777.

In re CLAIM OF THE FOUNDATION CO.

1. On reconsideration the decision dated July 21, 1920, is affirmed. The facts are fully stated in that decision. Claim is under G. O. 103 for \$24,147.34. (See Vol. VII, p. 100.)

Maj. Hill writing the opinion of the Board.

ON RECONSIDERATION.

1. This is a claim under G. O. 103, for \$24,147.34. A decision granting relief was rendered by the Board of Contract Adjustment, dated May 3, 1920. Upon the request of the Claims Board, Chemical Warfare Service, the case was reconsidered and a decision denying relief rendered by the Appeal Section, dated July 21, 1920. Claimant thereupon requested and was granted a rehearing that it might present further evidence. The facts are fully stated in the former decisions.

2. At the rehearing claimant presented testimony to the effect that the meal tickets in many instances were taken direct from the printer by claimant without being counted by or in the possession of the Government checkers. Claimant also presented an audit of its books by a firm of public accountants showing the total revenue received by claimant for meal tickets, as shown by its books, to be \$175,297.39. It also appeared from the testimony of claimant's witnesses that as early as July, 1918, claimant had knowledge that inventories of tickets were being taken and that claimant would be charged with all tickets.

DECISION.

1. The work out of which this claim arises was done by claimant under two formal contracts which had been fully completed by performance. The jurisdiction of the Secretary of War to determine the dispute rests, therefore, upon the fourteenth clause of the contracts, by which the contractor was granted the right to submit disputes to the Secretary of War for a final and binding decision.

2. While it is true that claimant has shown that in many cases the meal tickets did not pass through the hands of the Government checkers, there is no dispute as to the number of tickets printed and

delivered to claimant. The settlement as made, based upon the number of tickets delivered to claimant, is the only basis under which the rights of the Government are fully protected, and it is our opinion that the settlement as made should not be disturbed by the Secretary of War.

3. It is the opinion of this section that the decision dated July 21, 1920, denying relief should be affirmed.

DISPOSITION.

The Appeal Section transmits its decision to the Chemical Warfare Section.

Lieut. Col. McKeeby and Lieut. Tabb concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

JANUARY 4, 1921.

Case No. 2456.

In re **CLAIM OF BREESE AIRCRAFT CO. (INC.).**

1. **CONTRACTS—SETTLEMENT OF.**—Where a contract providing a fixed profit and a bonus on articles completed and accepted by the Government is suspended when two-thirds of the articles have been delivered to and accepted by the Government and the Government later accepts the balance of the articles in an uncompleted state the contractor is entitled to the profit and bonus on the cost of all articles accepted by the Government.
2. **CLAIM AND DECISION.**—Claim for \$50,462.86 arising through the suspension of Air Service contracts for Penguin training planes and spare parts. The facts are stated in an opinion reported in Volume VI. On appeal the Secretary of War approved and affirmed the decision of the Board of Contract Adjustment except as to item 1 and remanded the claim to the Appeal Section, War Department Claims Board, to determine the amount due claimant as profit and bonus. Held, claimant is entitled to recover profit and bonus based on the cost of all articles accepted by the Government.

Capt. Miller writing the opinion of the Board.

FINDINGS OF FACT AND DECISION.

The Board finds the following to be the facts:

1. This claim originally involved nine items, amounting to \$50,462.86, arising through the suspension of Air Service Contracts, Nos. 2365 for Penguin airplanes and 2538-1 for Penguin spare parts. From the decision of the War Department Board of Contract Adjustment, dated June 12, 1920, recorded in Volume VI, claimant appealed to the Secretary of War on items 1 and 2.

2. The Secretary of War, on November 30, 1920, remanded the claim to the Appeal Section, War Department Claims Board, with the following order:

“Upon consideration of the record in this matter, it is directed that the decision of the Board of Contract Adjustment be approved and affirmed except as to item 1 of the claim, and that further proceedings be had by the Appeal Section, War Department Claims Board, in order to determine the amount due claimant as profit and bonus in connection with contract No. 2538-1 for Penguin spare parts.

“**NEWTON D. BAKER,**
“*Secretary of War.*”

3. It is not necessary to repeat here the facts related in the former decision.

4. Item 1, amounting to \$14,165.08, is the total sum alleged to be due claimant as a fixed profit of 15 per cent of the estimated cost and a bonus of 25 per cent of any saving to the Government through the manufacture of the articles below the estimated cost, this item coming under the contract for spare parts.

5. When the contract in question was suspended two-thirds of the spare parts had been delivered and accepted by the Government. The other one-third of the spare parts had been 80 per cent completed and were later taken over by the Government and shipped from claimant's plant. The contract for spare parts was, therefore, fourteen-fifteenths completed on the date of receipt of the suspension notice and no work was done on this contract thereafter.

6. Article IV of the spare-parts contract provides that the price to be paid the contractor shall include:

"(2) A fixed profit of fifteen per cent (15%) of the estimated cost set forth in the schedule hereto attached marked "Schedule B" of each spare part delivered and accepted hereunder.

"(3) An amount for the savings effected, to be determined according to the provisions of * * * Article VI hereof."

Article VI provides the following method of determining the savings:

"At the completion or termination, for reasons other than the default of the contractor, of the contract, the total actual cost of all articles completed and accepted * * * shall be determined:

* * * * *

"If the amount so arrived at in accordance with the foregoing provisions shall be less than the total estimated cost of all the sets of spare parts, completed and accepted, the Government shall pay the contractor, on account of such saving, twenty-five per cent of such difference."

Article XI provides that in case of a termination of the contract by the Government for any cause other than the contractor's default, the contractor may continue the manufacture of spare parts from material on hand for a period of 30 days, and that in the event of such a termination the contractor shall be paid all costs of production, and in addition thereto—

"(1) On the spare parts properly packed and accepted the sum provided as a fixed profit by Article IV hereof.

"(2) On all spare parts not accepted * * *. The contractor shall be paid as a profit on the materials and spare parts, finished and unfinished, covered by this inventory, ten per cent (10%) of the amount of this inventory in lieu of the fixed profit and proportion of all saving in the cost of production of such partly completed articles."

7. The decision of the Board of Contract Adjustment allowed claimant a 15 per cent profit and a 25 per cent bonus on two-thirds of the spare parts completed and delivered to the Government, and only a 10 per cent profit with no bonus on the balance of one-third of the spare parts. While it is true that one-third of the spare parts was only 80 per cent completed when the contract was suspended, these articles were later "accepted" by the Government in their uncompleted state and claimant should be allowed its 15 per cent

fixed profit and its bonus of 25 per cent on savings under the 80 per cent of the one-third of the spare parts later "accepted" by the Government. Article XI restricts the profit to 10 per cent and eliminates the bonus "on all spare parts not accepted, both finished and unfinished," but the one-third of the spare parts 80 per cent completed was actually "accepted" by the Government, although the contract was not completed by performance, and although the contractor did not insist on 30 days' time in which to complete the contract. The allowance of the fixed profit and the 25 per cent bonus on savings as to all spare parts finally delivered to and "accepted" by the Government follows strictly the plan of payment set forth in Articles IV, VI, and XI, except for the fact that the Government accepted a portion of the spare parts in an uncompleted state. The Government's acceptance of these spare parts leaves no alternative but to pay claimant for these on the same basis as for spare parts completed and accepted. This can be done under Supply Circular No. 111.

8. Claimant urges that it should be allowed a 15 per cent profit and a 25 per cent bonus on savings based on the amount that it would have cost claimant to complete the contract. This contention is not sound, since the contract for spare parts was only fourteen-fifteenths completed when the suspension notice was received, and no work was performed on this contract thereafter. It is apparent, therefore, that the 15 per cent profit is limited to fourteen-fifteenths of the estimated cost of the contract and that the 25 per cent bonus for savings should be determined by deducting the actual cost of completing fourteen-fifteenths from the estimated cost of completing fourteen-fifteenths of the contract..

9. The Claims Board, Air Service, showed \$125,184.53 as the "actual cost of spares contract to date as total actual cost as claimed." The record is substantiated by claimant's petition on appeal to the Secretary of War in showing that \$125,184.53 is the probable amount that it would have cost the claimant if the spare-parts contract had been fully completed, this amount having been determined on the basis of the sum expended by claimant in completing two-thirds of the contract. The actual cost to the contractor of the work performed on the spare-parts contract to date of suspension was \$115,404.13, if only the items allowed by the Claims Board, Air Service, are included. While item 3 was allowed by the Air Service Claims Board the amount of this item was included in the actual cost of contract in determining the amount of savings and is included in the sum of \$115,404.13 in order to base the savings on the entire actual cost of the spare-parts contract. When the two items of \$78 and \$11,764.55, allowed by the Board of Contract Adjustment, are added the total actual cost becomes \$127,246.68.

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10. Assuming the sum of \$115,404.13, as disclosed by the record, to be the correct amount of actual cost after adding the items charged back and the additional items allowed by the Board of Contract Adjustment, the balance of fixed profit and bonus due the contractor is determined as follows:

Estimated cost of work performed on parts accepted by the Government, 14/15 of \$219,300-----	\$204, 680. 00
Actual cost of contract, including items allowed by Claims Board, Air Service-----	\$115, 404. 13
Additional amount of cost allowed by Board of Contract Adjustment -----	11, 842. 55
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Total actual cost of 14/15 of contract-----	127, 246. 68
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Amount saved-----	77, 433. 32
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Profits and bonus:	
25 per cent of savings (\$77,433.32)-----	19, 358. 33
15 per cent of fixed profit on \$204,680-----	30, 702. 00
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Total fixed profit and bonus-----	50, 060. 33
Amount previously paid contractor-----	42, 258. 79
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Balance of fixed profit and bonus due contractor-----	7, 801. 54

11. The claim as now allowed, after adding the fixed profit and bonus to the items approved by the Secretary of War on November 30, 1920, covers the following amounts:

Item No. 1, fixed profit and bonus-----	\$7, 801. 54
Item No. 2, additional bonus (disallowed in full).	
Item No. 3, items charged back -----	7, 834. 20
Item No. 4, executive salaries-----	11, 764. 55
Item No. 5, plant protection -----	635. 27
Item No. 6, traveling expenses (disallowed in full).	
Item No. 7, garage bill -----	78. 00
Item No. 8, freight on dope -----	73. 00
Item No. 9, rental of typewriters and adding machines-----	146. 50
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Total -----	28, 333. 06

DISPOSITION.

The Appeal Section, War Department Claims Board, hereby transmits to the Air Service Section, War Department Claims Board, a copy of the decision of the War Department Board of Contract Adjustment, dated June 12, 1920, together with a copy of the present decision for appropriate action.

Lieut. Col. McKeeby and Capt. Morgan concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

JANUARY 14, 1921.

Case No. 3058.

In re **CLAIM OF EVENS & HOWARD FIRE BRICK CO.**

1. **REJECTED MATERIAL.**—Where rejected material is stored at a camp site at the request of the contractor the Government assumes no responsibility therefor. The fact that the material can not later be located creates no presumption that it was used by the camp authorities. It may have been stolen or destroyed. The burden is upon the owner to show that the Government used or disposed of the material.
2. **CLAIM AND DECISION.**—Claim for \$116.92 for 750 feet of 8-inch terra-cotta sewer pipe. Held, relief denied.

Capt. Taylor writing the opinion of the Board.

FINDINGS OF FACT.

The Appeal Section finds the following to be the facts:

1. This claim is before the Appeal Section on appeal by the claimant from the action of the Quartermaster General denying claimant any relief on the claim.

The claim is for \$116.92, and was informally filed with the utilities officer at Camp Dodge on January 8, 1920.

2. The undisputed facts are as follows: On September 26, 1918, the Construction Division of the United States Army issued to Evens & Howard Fire Brick Co., St. Louis, Mo., requisition No. 33, which included, among other items, an item for 2,900 feet of 8-inch terra-cotta pipe. This requisition stated that "confirmation and payment of this order will be made by Charles Weitz' Sons"; consignment to be made to "U. S. Constructing Quartermaster, account Charles Weitz' Sons, Camp Dodge, Iowa."

The above requisition was confirmed by Charles Weitz' Sons by their confirming order No. 807.

On November 30, 1918, claimant shipped 1,050 feet of 8-inch pipe in car CP 98422 which reached Camp Dodge December 17, 1918. The contents of the car were rejected by the constructing quartermaster because the pipe was of an inferior quality. Claimant then requested that the car be unloaded and that the pipe that passed inspection be accepted and used and the remainder unloaded and piled on the ground within the limits of the camp site for claimant's convenience, and to be removed by claimant at some future date if

no use was found for it by the camp authorities. This was done and about 300 feet of the pipe was accepted and has been paid for by Charles Weitz' Sons.

The original invoice was for 1,050 feet of 8-inch pipe at \$0.1625 per foot. The rejected pipe, amounting to about 750 feet, or 300 pieces, was unloaded and "deposited just north of the detention camp spur between 33d and 34th Streets."

3. Apparently no attention was given to this rejected pipe by claimant for some months, but at various times during 1919 representatives of claimant did go out to the camp and try to locate the pipe. Being unable to locate the pipe claimant has filed this claim, and is now asking that payment be made for the entire amount of the rejected pipe at the contract price on the theory that the pipe has been used or disposed of by the camp authorities. Claimant's theory is that it must have been used by the Government, as it could not have disappeared in any other manner.

A careful search has been made of the records of the constructing quartermaster's office at Camp Dodge, the records of Charles Weitz's Sons, and of the records of the camp utilities officer at Camp Dodge, and no record has been found showing that any of the rejected pipe was used by any of the camp authorities either on the job for which it was originally intended or for any other purpose. The inventory made at the close of the calendar year 1918 by the constructing quartermaster at Camp Dodge shows only 33 linear feet of 8-inch sewer pipe.

4. There is in the file a copy of a memorandum furnished by claimant, dated November 18, 1919, which purports to have been prepared by Mr. George W. Jones, secretary and treasurer of claimant company, it being a memorandum of a verbal report made to him by Mr. C. C. Johnson, claimant's representative, just after the return of the latter from a visit from Camp Dodge. This memorandum is as follows:

"* * * Mr. Johnson reported verbally that he had located the rejected 8-inch pipe at Camp Dodge; that it was all piled up in a promiscuous jumble at the camp, just where it was unloaded from the car. He said it was in very poor condition, most of it badly broken, and that he did not think there would be to exceed 50 pieces of good pipe in the lot."

It was on the above report of its own representative that claimant presumes or takes for granted that the pipe has been used by the authorities at Camp Dodge, and that the Government is therefore under obligation to reimburse claimant for the same.

DECISION.

1. The rejected pipe, which was unloaded on the Government reservation at claimant's request, remained there at claimant's risk. The Government assumed no responsibility for the same. Of course, if it were used by the Government, there would arise an obligation to pay claimant the reasonable value of the quantity used. However, there is no proof that the Government used the pipe. If it had been used there would undoubtedly have been some record of it. If the pipe is not there at this time, that does not raise the presumption that it was used or disposed of by the camp authorities. It may have been destroyed or stolen. The report of claimant's representative, Mr. Johnson, is not conclusive that the pipe is not still there. In fact, the report indicated that the pipe is still there, but that most of it is "in very poor condition and most of it badly broken."

The burden of proof is upon claimant to show that the Government has either used or disposed of the pipe. Claimant has failed to show this.

2. For the reason stated above the relief asked for is hereby denied.

DISPOSITION.

A formal order denying relief will be entered.

Lieut. Col. McKeeby and Capt. Woodfin concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

JANUARY 14, 1921.

Case No. 1234.

In re **CLAIM OF UNITED STATES AIRCRAFT CORPORATION.**

JURISDICTION.—This Board has no jurisdiction over a claim for damages, whether liquidated or unliquidated, based on a terminated formal contract.

JURISDICTION.—The power of the Secretary of War to settle formal contracts by agreement with the contractor can not be exercised where the contract has been fully executed by performance by the contractor or terminated by breach and by expiration of time for performance.

Maj. Farr writing the opinion of the Board.

FINDINGS OF FACT.

1. This claim was filed with the Board of Contract Adjustment in the sum of \$22,838.30 prior to the 30th day of June, 1919, and on the 23d day of May, 1919, an additional or supplemental claim in the sum of \$5,032.73 was filed with the Air Service Claims Board, but for some reason was returned to the claimant and was not again filed with the Appeal Section, War Department Claims Board, until the hearing on the 10th day of December, 1920. The total amount of the claim, therefore, before this Board for consideration is the sum of \$27,891.03 arising out of a formal contract. On December 30, 1919, the original petition for the sum of \$22,838.30 was forwarded by the Board of Contract Adjustment to the Air Service Claims Board and was by the Air Service Claims Board turned over to the Liquidation Division for the purpose of making an investigation and settlement under the terms of the formal contract and was by this division returned to the Air Service Claims Board with the information that the said division was unable, on the evidence before it, to attempt to make any settlement, and the said claim, together with certain files, was in turn forwarded to the Board of Contract Adjustment by the Air Service Claims Board on the 23d day of March, 1920, the said Claims Board having apparently treated this claim as one in the amount of \$5,032.73 which was the amount of the additional or supplemental claim presented to the Air Service Claims Board.

2. The facts seem to be that in 1917 claimant had a contract for 100 airplanes that was finally canceled before any delivery, and on the 26th day of January, 1918, received from the War Department

Order No. 20524 for the manufacture of 50 airplanes, JND-4, the said order setting out the various items going to make up the 50 airplanes and the prices to be paid therefor, which included some extra parts to a total sum of \$326,242. Formal contract No. 2709, embodying Order No. 20524 and making it a part thereof, finally entered into by the claimant with the United States Government under date of the 6th day of February, 1918, provided for the completion and delivery of the airplanes in question on or before the 26th day of February, 1918. The material parts of the said contract being set out as follows:

* * * * *

"Whereas Congress having declared by joint resolution approved April 6, 1917, that war exists between the United States of America and the Imperial German Government, the President hereby places an order with the United States Aircraft Corporation, the contractor, as an order under the provisions of section 120 of an act making further and more effective provisions for the national defense, and for other purposes, approved June 3, 1917, with the requirements that it comply with the contract hereinafter set forth to manufacture the articles described in Order No. 20524 annexed hereto and made a part hereof, all in accordance with drawings and specifications of the articles referred to in the order hereto attached, as now existing or as hereafter modified or changed;

"Now, therefore, the parties hereto do covenant and agree to and with each other as follows:

"ARTICLE I.

"The contractor shall manufacture and supply, in accordance with the authorized requirements of the inspectors hereinafter provided for, the articles described in the order attached hereto at the times and in the quantities hereinafter set forth, and will deliver the same packed for shipment in the manner covered by the specifications f. o. b. the contractor's plant as Redwood City, California.

"ARTICLE II.

"The contractor shall conform in all respects to and with the order hereto attached and with specifications No. 1500, 5001, and 270028 hereto attached, which are hereby adopted and made a part of this contract, including all authorized changes therein, all of which are deemed and taken as forming a part of this contract with like operation and effect as if the same were incorporated herein. All parts for which spare parts are to be furnished shall be made interchangeable unless otherwise specified.

"ARTICLE III.

"No changes shall be made in said drawings or specifications, except as provided in this article. Changes may be made at any time by mutual agreement between the contracting officer and the con-

tractor. In the case of failure to agree a written request for such changes shall be made by the party desiring the same. The final decision thereon shall be made by the contracting officer in writing after opportunity has been given by him for a hearing to the contractor. The time for such hearing shall be set by the contracting officer, but production, inspection, and acceptance shall proceed as before and shall not be interrupted thereby pending the final decision.

"Changes so approved shall become effective at such times and in such manner as will not interfere with or retard production, except that changes which necessarily retard production shall be made to apply as follows:

"The total quantity of articles to be supplied under this contract shall be divided into five (5) lots.

"Changes determined upon during the production of the first lot shall be applied only to production at the beginning of the third lot, and so on throughout the contract, the intention being to allow at least one lot to be produced between the determination of the change and its application to the production.

"The purchase price per article as determined by this contract shall be adjusted so as to meet the full loss or gain in manufacturing cost to the contractor caused by the application of such approved changes to the product.

* * * * *

"ARTICLE V.

"The Government shall have one or more inspectors at each of the contractor's factories and other points, at its discretion, where and during the time the articles hereby contracted for and their component parts are being manufactured and tested, and of making such tests thereof as such inspectors may deem necessary or advisable in order to determine the compliance of such articles with the requirements of this agreement, and the inspector shall promptly give a decision concerning acceptance or rejection, subject to later rejection for cause. The contractor agreed to afford, or to cause to be afforded, to such inspectors the fullest opportunity of observing such articles and their component parts at all times during their manufacture and of testing the same without, unreasonable destruction of the contractor's property, at any time before delivery. All articles hereby contracted for are subject to factory inspection and test and to final acceptance or rejection by an inspector of the contracting officer after satisfactory completion of such inspection and tests, and the contracting officer shall provide an adequate number of inspectors for this purpose. Final acceptance shall be evidenced by the immediate issuance to the contractor of a final inspection certificate by the inspector. The decision of the Chief Signal Officer of the United States Army as to quality of material and workmanship shall be final.

"ARTICLE VI.

"Unless prevented by strikes, floods, riots, railroad or other embargoes, car shortages, act of God or the public enemy, or other similar causes of delay not within the control of the contractor or

caused by the contracting officer, the work under this contract is to be prosecuted at all times with the utmost vigor and dispatch, and time shall be considered as of the essence of this contract, and the contractor shall give precedence in its plant to work hereunder or under similar contracts for the Government.

* * * * *

"ARTICLE IX.

"The contractor agrees to furnish and deliver and the Government to purchase and take hereunder the articles described in said order annexed hereto, including all attachments and connections, all to be manufactured, assembled, packed, and delivered in full compliance with the drawings and specifications of the said articles referred to in the order hereto attached, as now existing or as hereafter modified or changed, in accordance with the terms of this contract.

"Subject to the provisions of Article VI hereof, it is agreed that the contractor shall have the articles hereby contracted for ready for final inspection at the times and in the quantities designated in the following schedule, and immediately after inspection and acceptance shall deliver the same packed for shipment in the manner provided in Article I of this agreement, viz, February 26, 1918, all articles called for.

"The contractor agrees that it will, if possible, and if requested to do so by the Government, and without further cost to the Government, install in said aeroplanes, within the period in which said planes are to be delivered under the terms of this contract, any engines which the Government may furnish and deliver to the contractor for that purpose at the contractor's works at Redwood City, California: *Provided*, That if the Government shall fail to furnish to the contractor by a date allowing a reasonable time for such installation such engines as it may desire the contractor to install as aforesaid, the contractor shall be allowed an extension of time for such installation equal to such delay in furnishing said engines.

"It is further understood and agreed that if upon the completion of any of the planes called for in said order the Government shall fail to deliver to the contractor the engine or engines to be installed therein, the contractor will, if requested by the contracting officer, and at the expense of the Government, ship such article or articles to any point in the United States designated by the contracting officer, and will further, if so requested by the contracting officer, send to such point such mechanics as may be necessary to properly install such engine or engines and will cause the same to be duly installed, the actual traveling expenses of such mechanics and their time en route to be paid by the Government. In such case four thousand dollars (\$4,000) on account of the purchase price provided for such plane in said order shall be paid upon the acceptance of each such article at contractor's plant and the remainder upon completion of the installation of the engine: *Provided*, That the contracting officer may, if he shall deem it wise, authorize the payment of the whole or any part of such unpaid balance before the completion of installation of the engines.

* * * * *

"ARTICLE XIII.

"It is understood by the parties hereto that the airplanes to be manufactured hereunder are to be used for training planes and are useful to the Government only during the present war and only if promptly delivered, and it is an essential element of this contract, and that if the contractor shall fail to make delivery of any or all of the articles herein contracted for in conformity with the conditions and requirements of this contract and within the time prescribed, the Government will be damaged thereby, and the amount of such damages is hereby fixed and agreed to in advance as liquidated damages and not as a penalty, and the Government without prejudice to its right to abrogate this contract for default by the contractor, may make deductions from the contract price accordingly as follows: For each day's delay until satisfactory delivery shall have been made, or until such time as the Government may, if it shall so elect, procure the same elsewhere, at a rate of one-sixth ($\frac{1}{6}$) of one per cent (1%) rejection of deliveries not to be considered as waiving deductions, provided that such delays shall not have been caused by act of the Government, by strikes, riots, fire, or other disaster, delays in transit or delay on the part of transportation companies, or by other similar circumstances beyond the control of the contractor, but such circumstances shall not be deemed to include delays on the part of subcontractors in furnishing materials when such delays arise from causes other than those herein specified, and provided further that any claim for exemption under this clause shall be made in writing before payment is made for the articles, and that the question whether delays are due to causes herein specified shall be determined by the contracting officer. The Chief Signal Officer of the United States Army, however, may, if he shall deem it wise so to do, waive such damages in whole or in part.

"ARTICLE XIV.

"When, in the opinion of the contracting officer, production will be facilitated, he may, from time to time, during the terms of this contract furnish and supply to the contractor such raw material or fabricated or partially fabricated parts as any of the units hereby agree to be manufactured and delivered by the contractor, when the contractor has not already purchased or agreed to purchase the same, and the cost of such material furnished to the contractor, plus one per cent (1%) for carrying charges, shall be deducted by the Government from the total amount to be paid to the contractor under this contract by reducing the payments to be made for each unit remaining to be delivered pro rata to the total amount of the cost of such materials delivered.

"ARTICLE XVII.

"Except as in this contract otherwise provided, any doubts or disputes which may arise as to the meaning of anything in this contract shall be referred to a board composed of three (3) officers of the United States Army appointed by the Secretary of War. If, how-

ever, the contractor shall feel aggrieved at any decision of this board upon such reference, it shall have the right to submit the same to the Secretary of War, whose decision shall be final."

3. The claimant upon the receipt of the purchase order and later the contract proceeded to manufacture the planes, and alleges that owing to the various changes in the plans and specifications that it was compelled to provide additional materials, tear down and replace parts of airplanes already constructed, send men to flying fields for the purpose of installing wires and other equipment of planes already delivered, and discard certain fabricated parts of planes at their factory owing to the said changes in plans and specifications that were not contemplated under the provisions of the contract, or any of the plans and specifications attached thereto, and owing to the fact that it was compelled to make the various changes called for it has been compelled to expend the additional sum of \$27,891.03, which said sum includes the cost that claimant was put to in making test flights of approximately 15 of its machines, and that the said test flights were not called for or provided for under the contract, but that claimant was compelled to make such tests before the Government would accept its planes, and that in addition thereto the Government under the provisions of the said contract furnished claimant certain materials at excessive rates, and that other materials furnished it by the Government, with a Government stamp of approval upon the same, were, upon receipt at its factory, found to be defective by Government inspectors stationed at its plant and were therefore condemned by the said inspectors, necessitating the replacement of the same by the claimant at an extra expense.

4. Claimant in its original petition has divided its claim into seven items, so we deem it advisable to set the same out briefly item by item:

Item I is for \$1,160 for the alleged change of 58 stick controls at \$20 each, the contention of the claimant being that these controls were made by them in accordance with the drawings and specifications which provided for their assembly with taper pins at the fixed joints, and that later this was found to be an insecure method of fastening and they were compelled to brace all these parts, which necessitated the disassembly of all the stick controls received from its subcontractor, and that not only this but they were compelled to have their men make the same changes at various fields on all machines that it had shipped prior to the receiving of this ruling.

Item II is for the replacing of cables on 17 machines, 1,190 wires at \$4, or a total of \$4,750. It alleges that these wires were made up in strict accordance with the plans and specifications, but as they did not conform in some respect to the usual field practice, they were

compelled to replace these wires at a cost of \$4 per wire, and that it attempted to persuade the inspectors to allow it to make up these wires in accordance with the ideas of the people who were to use them, but were refused this permission.

Item III is for the labor of replacing wires and making minor changes at March Field and Rockwell Field to the extent of \$1,235, and is made up of payments to seven men which they allege were carried on their pay rolls.

Item IV is for similar expenses of six men at San Diego and Riverside for similar work, they alleging they have the canceled checks to substantiate this payment.

Item V is for charges in the sum of \$2,825 for uncrating, assembling, reinspection, disassembling, and crating eight planes, this being divided into \$200 per machine for the actual work of uncrating, setting up, disassembling, and recrating and \$175 per machine for the additional work, the allegation of the claimant being that these machines had been inspected and passed by the inspectors at the plant and crated by them ready for shipment, and that they were compelled to unpack and reassemble and do additional work on them, none of which was called for under the plans and specifications.

Item VI is for \$4,500 flying test of nine planes, the allegation of the claimant being that before the Government would accept the planes they were compelled to fly certain of them, for which they are asking that they be allowed the sum of \$500 per plane to cover amount paid pilot and incidental expenses in getting the planes ready for flight.

Item VII is for sundries as follows:

"(a) Spruce to ash longerons, 22 machines at \$45-----	\$990. 00
(b) Spruce to ash station 6 and station 7 fuselage struts, 48 machines at \$10 -----	480. 00
(c) Wire testing 50 machines complete at \$20-----	1, 000. 00
(d) Wire testing 20 sets of wings at \$15-----	300. 00
(e) Cotter pinning bolts, 12 machines complete at \$30-----	360. 00
(f) Cotter pinning bolts, 20 sets of wings at \$20-----	400. 00
(g) Cotter pinning bolts, 15 sets lower wings at \$7.50-----	112. 50
(h) Brazing fuselage fittings, 30 planes at \$10-----	300. 00
(i) Use of salvage tape, 20 sets of wings at \$10-----	200. 00
(j) Change of insignia from star and circle to concentric circles. obsoleted stock, 300 transfers at \$3-----	990. 00
(l) Numerous small changes enacted daily from start to finish of contract, cost conservatively estimated over and above items already considered-----	2, 500. 00
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	7, 682. 50 "

5. The claimant, in the petition for the payment to it of \$5,032.73, first presented to this Board at the hearing on December 10, 1920, sets the same up as follows:

Item I. Instruments-----	\$999. 01
Item II. Salvage of wing beams-----	681. 65
Item III. Lumber-----	3, 002. 07
Item IV. Chemicals-----	350. 00
Amount of claim-----	5, 032. 73

6. Under the item for instruments (\$999.01) it alleges that certain instruments were shipped it during the time it had the contract for 100 J. N. 4 D. airplanes, which was later canceled, and the contract for 50 planes entered into, that certain instruments that were shipped on Government orders to other fields, and that on the instruments on hand it should only have been charged \$171.50 per plane, or a total of \$8,575, but that the Government billed it at the rate of \$9,574.01, or overcharge deducted by the Government of \$999.01.

7. Under Item II, claimant alleges that 336 wing beams were shipped it from the Spruce Production Division, and of these 46 lower-wing beams at \$7.40, or a total of \$340.40, and 35 upper-wing beams at \$0.75, or a total of \$341.25, were rejected by Government inspectors at their plant, and that they should therefore be allowed the sum of \$681.65 on account of this rejection for material that was furnished it by a Government agency as being suitable for the construction of airplanes and which was later rejected by inspectors at its plant.

8. Under Item III, claimant alleges that the sum of \$3,002.07 is due on account of lumber purchased by it on the strength of a letter from Maj. Shepler of October, 1917, in which it was advised that the price per thousand feet for fir was \$55 and for spruce \$60, and that its acceptance of contract 20524 was based upon these prices quoted, and that the amount of lumber ordered by it should really only have cost \$5,912.26, but that the Government charged them \$8,914.33, or an excess of \$3,002.07.

9. Under Item IV, for chemicals, it alleges it purchased 350 gallons of Pratt & Lambert acetate dope and that upon receipt of the same it was notified not to use it as it was needed for battle planes, and that it thereupon went out into the market and purchased other dope, and that the said 350 gallons of Pratt & Lambert acetate dope, owing to the failure of the Aircraft Production Section to direct the proper disposal of same, was left on its hands at the close of the contract, when it was then allowed to dispose of it, suffering a loss of \$1 a gallon, or \$350.

10. Under date of June 3, 1918, claimant was advised by A. C. Downey, major, Signal Corps, office of the Director of Aircraft Production, as follows:

"1. Referring to your request for an extension of time under contract No. 2709, you are advised that the time for final delivery is hereby extended to July 15th, 1918.

JANUARY 15, 1921.

Case No. 3017.

In re **CLAIM OF JAMES SHEWAN & SONS (INC.).**

INVALID FORMAL AGREEMENT—CONSIDERATION.—Where parties make an oral agreement with the Government which is completely performed the subsequent reduction of said agreement to writing in the form of a formal contract is unauthorized and without consideration and will be disregarded by this Board and settlement will be authorized under terms of the oral agreement.

ORAL AGREEMENT.—Where claimant entered into written negotiation with duly authorized Government officer in the shape of proposals, which proposals were duly accepted, and the claimant proceeded to perform the work and afterwards entered into a so-called formal contract subsequent to the complete performance of the work, this Board will hold the said formal contract invalid and claimant is entitled to reimbursement in accordance with the former proposals and acceptances exchanged between claimant and the Government officer prior to the performance of the work.

REFORMATION.—Where a formal contract is entered into that attempts to embody a prior informal agreement and the said contract is signed long after the work contemplated in the said informal agreement has been completed, the said formal contract so entered into is null and void and this Board has no power to reform the said formally executed contract.

Maj. Farr writing the opinion of the Board.

1. This is a claim for \$39,028.56, statement of claim, form B, having been filed under Supply Circular 17, Purchase, Storage and Traffic Division, 1919, and is before this Board on appeal from the decision of the Claims Board, Transportation Service, which board granted partial relief in the sum of \$35,410, but denied an item for dry-docking in the sum of \$3,618.56.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. On February 10, 1918, the claimant company, engineers, iron-workers, and shipwrights of Brooklyn, N. Y., submitted the following proposal to Maj. R. A. McCabe, Q. M. R. C., supervising marine superintendent of the Army Transport Service, New York City:

“Replying to your specifications for dry-docking, also for making repairs and renewals to the United States Army transport *City of Savannah*, would say that we will dry-dock this vessel for the sum

of twelve cents (\$0.12) per gross ton for the first day and for ten cents (\$0.10) per gross ton for lay days, and to make the repairs and renewals, including drawing of tail shaft, removing broken stern tube, furnish and install new stern and stuffing box, rewood stern bearing, reinstall and connect up tail shaft complete, working continuously day and night, for the sum of thirty-four thousand nine hundred fifteen dollars (\$34,915)."

By letter dated February 10, 1918, Maj. R. A. McCabe, by W. S. MacQuillan, captain, Q. M. R. C., accepted said proposal:

"1. Referring to your informal proposal of even date offering to dry-dock the U. S. A. C. T. *City of Savannah* for the sum of twelve cents (\$0.12) per gross ton for the first day and for ten cents (\$0.10) per gross ton for lay days, and to make the repairs and renewals, including drawing of tail shaft, removing broken stern tube, furnish and install new stern tube and stuffing box, rewood stern bearing, reinstall and connect up tail shaft complete, working continuously day and night, for the sum of thirty-four thousand nine hundred fifteen dollars (\$34,915), you are informed that same is hereby accepted.

"2. Bond in the amount of \$17,458 will be required of you in guaranty of your contract which is now in course of preparation in this office and will be forwarded for signature at the earliest practicable moment.

"3. Please acknowledge receipt of this communication in writing and inform this office whether corporation or individual bond is desired in this instance, that proper forms may be inclosed for accomplishment with contract.

"4. Kindly proceed with the accomplishment of this work at once, completing same as expeditiously as possible."

2. Claimant company, on February 10, 1918, made the following supplemental proposal in reference to the U. S. Army transport *City of Savannah*:

"Supplementing our previous proposal of this date, we hereby offer to paint the bottom of this vessel with one (1) coat each of anti-corrosive and antifouling composition for the sum of four hundred ninety-five dollars (\$495)."

This proposal was accepted by the following letter dated February 10, 1918, and signed by Maj. McCabe, by W. L. MacQuillan, captain, Q. M. R. C.:

"1. Referring to your informal proposal of even date, offering to paint the bottom of the U. S. A. C. T. *City of Savannah* with one (1) coat each of anticorrosive and antifouling composition for the sum of \$495, you are informed that same is hereby accepted.

"2. Kindly proceed with the accomplishment of this work at once, completing same as expeditiously as possible."

3. The work called for in the foregoing proposals and acceptances was commenced on or about February 11, 1918, and completed within a very short time thereafter, in accordance with the terms of the said

proposals and acceptances. The weather during the performance of this contract was very adverse, being extremely cold, and the harbor filled with ice.

4. After the claimant had fully executed the said agreements by performance, and on or about August, 1918, contract No. 423 was signed by the claimant and Col. A. W. Yates, Q. M. C., U. S. A., on behalf of the Secretary of War, covering all of this work, and including dry-docking of the U. S. A. C. T. *City of Savannah*. This contract, while not signed until August, was, nevertheless, antedated to February 11, 1918, and only provided for a total payment of \$34,915. The caption reads: "For dry-docking, repairs, and renewals, U. S. A. C. T. *City of Savannah*."

Paragraph 1 of the said contract provides—

"1. That the contractor shall furnish the materials and services for the construction work specified below at the place or places indicated therefor, commencing on or before the 11th day of February, 1918, carrying the work forward with reasonable dispatch and completing the same March 8, 1918, all in the manner and at the rates or prices (unit prices or total sum, or both, and in accordance with article 6 hereof), as follows:

"Furnish all necessary labor, material, and equipment, and perform following work in accordance with specifications hereto attached, entitled, respectively, dry-docking and specifications for dry-docking the U. S. A. C. T. *City of Savannah*, at a total cost of thirty-four thousand nine hundred and fifteen dollars (34,915).

"Dry-dock U. S. A. C. T. *City of Savannah*, and make repairs and renewals, including drawing of tail shaft, remove broken stern tube, furnish and install new stern tube and stuffing box, rewood stern bearing, reinstall and connect up tail shaft complete.

"Contractor shall commence work hereunder at once and complete same as expeditiously as possible, working day and night."

Paragraph 1 of "Specifications for dry-docking" provides that the claimant shall—

"Furnish suitable dry dock and place vessel in same at such time as general superintendent Army Transport Service may elect. Undock vessel upon completion of specified work for which dry-docking is required. Separate price on this item. Vessel to be delivered to and taken from dry dock by the Government. Contractors will state deepest draft at which vessel can be docked."

Also attached is a further "Specification for dry-docking":

"1. Paint bottom in accordance with supplementary specifications attached hereto. State paints to be used.

"2. Draw tail shaft for examination. Should it develop upon examination that it will be necessary to renew bottom halves of lignum-vitæ bearings, this will be accomplished and separate price furnished for same.

"3. Stern gland is now in poor condition, and it will be necessary to make thorough examination of this gland when vessel is in dry dock. Necessary repairs will be made as directed by inspector in charge.

"4. Such extra work not foreseen at this time will also be accomplished as directed by the inspector in charge and separate price will be furnished for this work also."

5. Claimant upon completion of the work and under date of March 6, 1918, presented a bill embodying the following items:

To hauling out twice, 5,654 tons, 12-----	\$1, 356. 96
To 4 lay days, 5,654 tons, 10-----	2. 261. 60
To applying one coat of anticorrosive and one coat of antifouling paint on bottom-----	495. 00
To making renewals and repairs in accordance with specifications dated February 8, including the drawing of tail shaft for examination. Removing broken stern tube, furnish and installing new stern tube; furnish and installing new stuffing box, rewooding stern bearing, replacing tail shaft and propeller, all connected complete as per our tender Feb. 10, 1918-----	34, 915. 00
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	39, 028. 56

and it is from the refusal of the Transportation Claims Board to allow the said items for drydocking of \$3,618.56 that the claimant has appealed to this Board.

6. It is the contention of the claimant that it is entitled to the full sum of \$39,028.56, or that the sum of \$4,113.56 should be allowed it in addition to the sum of \$34,915 named in the formally executed contract, as this said sum was included in their proposal dated February 10, 1918, and was for drydocking and painting the vessel in question, and was accepted by the Government, but that "in drawing up these contract papers, the Government contract clerk inadvertently omitted inserting the cost of hauling out, lay days, and bottom painting, which sum totals \$4,113.56. This contract was duly signed by our secretary and treasurer, acting under the supposition that same had been drawn in accordance with our tender and without first comparing same with the original tender, or letter of acceptance," and that the said proposals and acceptances and specifications are clear and unambiguous and that the same duly set forth the contract entered into between the parties, and that the claimant should therefore be paid in accordance with the said proposal and acceptance.

7. Claimant has submitted an affidavit in which it makes a part thereof a paper it has filed as Exhibit A, the same consisting of 36 items, totaling \$11,006 and under water repairs \$23,909, aggregate amount \$34,915, the items of painting and hauling out or drydocking of the vessel not being mentioned, the claimant alleging that these figures set up in Exhibit A were agreed upon with the representative of the Transport Service at the time the tender in question was made and that it was well understood with the representatives of the Transport Service that the sum of \$34,915 in no wise embraced docking or undocking of the vessel or the painting of the bottom.

8. It is the contention of the Government that the drydocking and painting was included in the sum of \$34,915 and that this was the understanding of the parties was shown by the formal contract which included drydocking for the sum of \$34,915 and on the further grounds that at or about the time of the receipt of the lump sum estimates one of the officers in the office of the Director of Embarkation telephoned the office of the claimant and that the claimant stated the item of \$34,915 included drydocking charges.

DECISION.

1. For a proper consideration of this case, it is necessary for this Board to decide:

1st. Is the formal contract No. 423 dated the 11th day of February, 1918, entered into in conformity with section 3744 of the Revised Statutes and binding upon the Government and claimant, or;

2d. Do the proposals and acceptances exchanged between the claimant and Government officers constitute the terms of the agreements really entered into between the parties and if so, what are those terms?

2. Taking up the first question of whether or not the formally executed contract in question is a valid contract, complying with the spirit and the terms of section 3744 of the Revised Statutes, we are brought face to face with the question of whether or not a past consideration or past services are such a valuable consideration that a contract entered into subsequent to the performance of the work, does comply with the said provisions of the Revised Statutes.

3. The contract in question provides for the doing of a vain or impossible thing in that it provides for the work on the U. S. S. *City of Savannah* that had previously been done by the claimant, leaving no work to be done under the terms of the said contract. If it is possible for the Government officers to enter into a contract covering work that has already been done under informal proposals and thus comply with the provisions of section 3744, Revised Statutes, there would have been no necessity for the enactment of the act of March 2, 1919, because the Secretary of War would have been enabled to validate all the previous informal contracts that had been entered into by the simple process of at a later date entering into formal written contracts covering the provisions and the terms of the informal agreements.

4. The Comptroller of the Treasury in his decisions (vol. 25, p. 410), dated November 26, 1918, in the case of the New Jersey Zinc Co., which was a case in which the contract was alleged to have been entered into on the 1st day of January, but certain interlineations on the said contract indicated it was signed in April of that year, while

not deciding the case squarely on the question under discussion, disposed of the point in issue in the following language:

"But assuming the contract was signed April 4, 1918, there was then nothing to contract about, the period during which its terms were to operate having expired, and it could not operate retroactively."

5. This point has previously been before the Board of Contract Adjustment and was squarely decided in the claim of the Larkin Co., Case No. 483, decided April 5, 1920, reported in Volume IV, page 1226:

"Contract No. 1575 was not fully executed and delivered until after all the tubes covered thereby had been delivered to the United States. The execution was after full performance by the contractor and was intended to be retroactive and merely to facilitate payments. Since the contractor had done all it agreed in that instrument to do, no consideration moved to the United States for the execution of that contract and the purported waiver of the Government's defense of section 3744, Revised Statutes. That defense can not be given up except on good consideration, which was lacking here. (25 Compt. Dec. 410.) *We think, therefore, that the execution of that contract on behalf of the United States was without authority and nugatory.*"

Again in the case of the American Sponging Co., Case No. 1878, Volume V, Part I, page 406, decisions of the Board of Contract Adjustment, it was held:

"*Subsequent formal contract.*—Where an oral agreement was reduced to a formal written contract after the armistice and after production had ceased under the oral agreement, and there was no longer any necessity or new consideration, the written contract is void and claimant's rights are governed by the act of March 2, 1919."

6. As is stated in the case of Larkin Co.:

"There is no authority in the Secretary of War to reduce informal agreements to writing in compliance with section 3744, Revised Statutes, and make them binding obligations of the Government when the need for the articles informally contracted for has ceased to exist."

The work having been done, and the materials necessary for the performance of the same having been furnished and accepted by the Government, prior to the signing of the contract in question, this Board is of the opinion that the said contract does not comply with the provisions of section 3744 and is therefore null and void, as the Secretary of War has no authority to enter into a contract retroactive in character and to cover terms of an agreement that has been concluded by performance.

7. We come then to the second point in issue:

"Do the proposals and acceptances exchanged between the claimant and Government officers constitute the terms of the agreements really entered into between the parties; and if so, what are those terms?"

From a careful examination of the evidence in the files and the various affidavits that have been produced by the officers instrumental in negotiating the informal agreement, this Board is of the opinion that the claimant entered into an informal contract with the duly authorized representatives of the Government whereby it agreed to dock the U. S. S. *City of Savannah* and to make certain repairs, including the painting of the hull, and this Board is further of the opinion that the said written proposals and acceptances thereof constitute the true agreement between the claimant and the United States Government, for, as stated in *McLaughlin & Co. v. United States*, 36 Ct. Cls. 138 (1901); and *Sanger v. United States*, 40 Ct. Cl. 47 (1904), and as cited in Shealy on Government Contracts, page 197:

“In this instance the negotiations were all in writing and formal in character. It is but reasonable to presume, where the parties have in this manner specifically and clearly agreed to the terms of a transaction, that in the absence of any further discussion the formal instrument required by law would embody these terms without material variations.”

Therefore the formal contract entered into after the work was performed, and which we have heretofore found was null and void, should not be construed as evidence of the informal agreement entered into between the claimant and the Government, but the written proposals and acceptances exchanged between the Government and the claimant at and during the performance of the work in question are the best evidence and truly sets forth the agreement between the parties.

8. This Board is further of the opinion that the said proposals and acceptances, as exchanged between the Government and the claimant, constitute an agreement that the Secretary of War is authorized to adjust and settle under the provisions of the act of March 2, 1919, and that the claimant is entitled, in addition to the sum of \$34,915, to the further sum of \$495 for the painting of the hull of the ship in question, and that the proposal in the sum of \$34,915 did not include the charges for hauling out and for lay days, and that the claimant is, therefore, entitled to the additional sum of \$3,618.56 for dry-docking and lay days or to a total sum of \$39,028.56.

DISPOSITION.

This section will make up and transmit a statement of the nature, terms, and conditions of the agreement and certificate Form C to the War Department Claims Board for action in accordance herewith.

Lieut. Col. McKeeby and Capt. Sheppard concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

JANUARY 18, 1921.

Case No. 2305.

In re CLAIM OF C. AUSTERN & CO.

1. **RECOMMENDATION OF AWARD.**—A statement made by a War Department official to a contractor to the effect that the contractor would be recommended for an award of a contract does not constitute an informal agreement under the act of March 2, 1919.
2. **COMMITMENTS.**—A contractor can not be allowed for losses incurred in connection with commitments made prior to the date of an informal agreement under the act of March 2, 1919, since such commitments could not have been made on the faith of the agreement.
3. **LOSS FOR IDLENESS OF PLANT AFTER SUSPENSION OF CONTRACT.**—When an informal contract has been suspended by the Government the contractor is entitled to an allowance for loss on rent of plant for a reasonable time while the contractor is endeavoring, without success, to obtain work.
4. **CLAIM AND DECISION.**—Claim for \$6,268.21 under the act of March 2, 1919, for alleged losses on raw material and overhead in connection with an informal agreement. Held, claimant is allowed losses on material purchased after date of agreement and certain items of overhead.

Capt. Miller writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim, for \$6,268.21, was decided adversely to claimant in a decision of the War Department Board of Contract Adjustment dated March 18, 1920, reported in volume 4, page 484, and thereafter the claimant took an appeal to the Secretary of War. The claim had been presented to the Claims Board, Office Director of Purchase, for settlement of an informal contract dated October 29, 1918, for 24,000 new model overcoats, which Board allowed claimant \$1,347.56 as the amount due for losses arising through the purchase of raw material, but disallowed the other items of the claim. Claimant thereupon appealed to the Board of Contract Adjustment, and in the decision of March 18, 1920, was denied all relief, including the amount previously allowed by the Claims Board, Office of Director of Purchase.

2. The Secretary of War on August 9, 1920, remanded the claim to the War Department Claims Board with the following order:

AUGUST 9, 1920.

Upon consideration of the record herein, it is ordered that the Appeal Section, War Department Claims Board, establish an in-

formal agreement in accordance with the testimony of the witness, Austern, unless reasonable inquiry should lead the Board to the conclusion that his testimony with regard to the existence of such agreement is not in accordance with the facts; and that settlement of such agreement be made in the usual manner and include such reasonable allowance on account of rent and overhead expenses actually paid by claimant as the Board shall find applicable to the contract here involved, in conformity with my decision in the claim of the Pennsylvania Tank Car Co., Case No. 150-C-1829. (Copy attached hereto.)

NEWTON D. BAKER,
Secretary of War.

3. The testimony of Mr. Carl Austern at the hearing before the Board of Contract Adjustment was to the effect that "a man formerly with Filenes," but at that time with the New York office of the Clothing and Equipage Division, had told him that an order was "going through" for claimant; that "the day after I received the award they sent for me and told me I had received a contract"; and that on September 26 or 27 he knew that he had a contract. Mr. Austern also testified as follows:

"Mr. AUSTERN. They sent for me. At that time a man was there from Rogers-Peet people. He was supposed to be at the head of all this work, and he sent for me and gave me instructions how I should make things and how I could cut my lays: that I could not make long lays and everything else; that we should not stretch the goods too long.

"Mr. MONTGOMERY. You have not got anything else in writing that shows when this contract was awarded to you?

"Mr. AUSTERN. It was published in the papers.

"Mr. MONTGOMERY. But you have not any such publication that will give you the date?

"Mr. AUSTERN. I have not got it with me. I can get it in New York, I believe." (Tr., p. 31.)

"Mr. AUSTERN. I saw it in the newspapers and they sent for us to tell us they had given us an order for 24,000 overcoats.

"Mr. MONTGOMERY. Who sent for you?

"Mr. AUSTERN. I can't remember his name. He was at Rogers-Peet." (Tr., p. 46.)

"Mr. AUSTERN. Kirstein told me not to stop. Kirstein was the one I saw on 16th Street at that time, and he told me I should not stop. I wanted to give up at that time, because I had a little trouble with the union cutters, and he said 'No; don't stop; we will keep you busy right along.'

"Mr. PRICE. When was it you talked with him?

"Mr. AUSTERN. With him in September. But the one that gave me instructions for making overcoats was a different man entirely. He was with Rogers-Peet. Kirstein was at Filenes." (Tr., p. 56.)

4. When the claim was returned to the Appeal Section a further investigation was made in order to carry out the instructions of the Secretary of War. Claimant was requested to furnish the names of

the Government officials who promised it an order for overcoats prior to October 29, 1918, the date of contract No. 7612-N, whereupon Mr. Austern furnished an affidavit which reads in part as follows:

"That deponent was informed of the award of the said contract to his firm prior to October 29, 1918, which is the date of the formal award and that he was so informed in the early part of the month of October, 1918, and deponent can not state the exact date. That deponent received also definite instructions as to the manner in which this contract was to be executed and instructions to proceed work at the same time in the early part of October, 1918, and before the formal award of the written contract. Deponent was informed of said award by a gentleman named Kurstein, who deponent believes was the head buyer or superintendent in the office conducted by the Government on East 16th Street in the Borough of Manhattan, New York City. That a Mr. Geyer was connected with the Government office at Sixth Avenue and 21st Street in the Borough of Manhattan, New York City, and who understood the manufacture of clothing thoroughly, gave instructions to this deponent in the early part of October, 1918, with respect to the execution of this contract and gave advice as to how the lays of the goods should be made and as to the manner in which they shall be cut, and the said Mr. Geyer knew of the award of this contract and told deponent of it, and also gave instructions to deponent to proceed with the work on it pending the receipt by deponent of the formal contract."

5. At the second hearing Mr. Austern testified that Mr. David F. Geyer, formerly with Rogers-Peet Co., New York City, had informed him that his firm had a contract for 24,000 overcoats and had given instructions concerning the manufacture of the new model overcoat. He admitted that Mr. Louis E. Kirstein, of William Filene's Sons Co., of Boston, Mass., had not advised him that his firm had received an award for these overcoats. It was explained by claimant's witnesses that Mr. Austern must have meant some other party in Mr. Kirstein's office when he prepared the affidavit of September 10, 1920, above quoted in part.

6. At this hearing claimant was unable to fix the date on which the members of the firm had seen a notice in a New York newspaper to the effect that claimant had been awarded a contract for 24,000 overcoats, and did not produce the newspaper notice in question.

7. Mr. David P. Beach, the other member of the firm of C. Austern & Co., testified that he had had several conversations with Government officials at the Clothing and Equipage Division office in New York City prior to the actual receipt of the contract. He stated that Mr. Harry L. Wells had promised him on August 2, 1918, that if he would accept the contract for 24,000 cotton service coats that Mr. Wells would recommend the firm for an overcoat contract; that "as soon as we could show that we could handle another contract he

would give it to us as soon as it came through," but that in promising this firm contracts for all it could handle Mr. Wells never mentioned quantities. The following testimony of Mr. Beach covers his conversations with Mr. Wells:

"Mr. BEACH. He told me the morning after it appeared in the paper, when I called on him, that he had read in the paper that we had received the award then. Prior to that I talked with him a number of times, and he said he would help us and do all he could to give us an overcoat contract. In fact, he told me if I would take the contract for cotton goods he would do everything for me on the overcoats. I tried to give up the cotton goods, but he insisted on my making them. (Tr. p. 121.)

* * * * *

"Question. How did this happen? Did you go up there with the paper and see Mr. Wells and mention this or did Mr. Wells mention it to you?

"Mr. BEACH. I went there to see him regarding other matters and mentioned it to him and talked to him about it. I said, as near as I can remember it, 'You have finally come along.' I was there every day after a contract, and I said 'Finally this thing has come through. We have plugged on it a long time, and finally we succeeded in getting it.' We had quite a lot of talk about it, probably fifteen minutes." (Tr. p. 159.)

Mr. Beach testified as follows concerning his conversations with Mr. Tully and Mr. Cave:

"Question. What were the conversations that you had with Mr. Tully?

"Mr. BEACH. Well, I had conversations during all the times with him regarding the general business affairs of all our contracts.

"Question. What conversations did you have with him concerning this particular contract for 24,000 overcoats?

"Mr. BEACH. Nothing further than I told him that I had noticed the notice in the paper, and told him I understood that we had it, and he said, 'I saw that in the paper also;' he said, 'I guess it is all right.' I had practically the same conversation with Mr. Cave also." (Tr. p. 122 and 123.)

8. Mr. Louis E. Kirstein was called and testified in part as follows:

"As far as any definite promises were concerned, I never made any to anybody, because I was not in a position to make any definite promises. All we civilians were to do, of course, was to make a recommendation for an award." (Tr. p. 131.)

9. Mr. David F. Geyer, who had charge of the construction in the New York zone of outer garments for soldiers from October 7, 1918, until December 18, 1918, testified that his office took no part in recommending or awarding contracts or in notifying claimants of the award of contracts, and denied the statement of Mr. Austern that Mr. Geyer had advised him that a contract for overcoats had been awarded claimant. He said:

"We never issued an order without it was a written one, and as for giving instructions on a future contract, that could not occur."

10. Mr. Harry L. Wells, who recommended awards of clothing contracts, furnished the following affidavit which was introduced in evidence with the permission of claimant:

"In re of the claim of C. Austern & Co., accruing out of an alleged contract for 24,000 overcoats.

"It was made clear to all contractors that all recommendations of the uniform section were subject to review by the board of awards and board of reviews and were finally executed by the local zone supply office in the district where the contractor operated.

"To the best of my knowledge the claimant was not given any information from our offices other than that he had been favorably recommended for a contract. It was entirely without our jurisdiction to promise that a contract would be awarded."

11. Mr. Beach was shown this affidavit and asked if he had any objection to the Board's considering it and placing it in the record, and replied as follows after reading the affidavit:

"Mr. BEACH. No; that is just what I claimed. He informed me that he had recommended us for an award, and told me that he would a long time prior to this. Then, when it came across, he said he had seen the article in the paper, and took my hand and said he was glad I got it." (Tr., p. 156.)

12. Claimant has received and accepted settlement from the Government on the following suspended contracts:

5328-N. August 2, 1918, 48,000 wool S. coats.

5655-N. August 19, 1918, 42,000 wool trousers.

4199-N. July 3, 1918, 21,000 overcoats.

5338-N. August 2, 1918, 24,000 cotton coats.

13. Claimant has submitted an itemized statement showing material purchased on the faith of this contract. However, only the following items were purchased after October 29, 1918:

Date of invoice:

Nov. 6, 1918, 50 pounds linen thread-----	\$95. 00
Nov. 11, 1918, 200 pounds mercerized thread-----	400. 00
Nov. 24, 1918, 25,000 size tickets-----	15. 00
Nov. 24, 1918, 25,000 labels-----	27. 50
Nov. 25, 1918, 900 pounds mercerized thread-----	2, 025. 00

DECISION.

1. It is evident that claimant failed to substantiate at the second hearing the testimony of Mr. Carl Austern given at the original hearing. Mr. Austern's statements at the first hearing were more or less of a general nature, and he failed at that time to name any particular Government official who promised him this contract or had informed him prior to October 29, 1918, that a contract for 24,000

overcoats had been awarded his firm. He did, however, state at the original hearing that officials of the Government had made such statements to him as would constitute an informal agreement under the act of March 2, 1919. The Secretary of War remanded the claim to the Appeal Section in order that further inquiry could be made concerning the existence of the agreement mentioned by Mr. Austern. This Board has gone into the matter very thoroughly since the return of the claim by the Secretary of War, and has given the claimant every opportunity to show definitely the alleged promises and by whom same were made. Both members of the firm had several conversations with officials of the War Department concerning the work being performed by claimant, but not one of these conversations can be construed as an agreement on the part of the Government to give claimant a contract for 24,000 overcoats. In fact, claimant's own testimony at the second hearing did not bear out the affidavit submitted by Mr. Austern shortly before that hearing. The detailed testimony of both Mr. Austern and Mr. Beach failed to make out an agreement, and the testimony of Mr. Kirstein, Mr. Geyer, and Mr. Wells indicates strongly that the Government made no promise to this claimant prior to October 29, 1918, concerning a contract for 24,000 overcoats. Of course, this claimant was assured, as were other contractors in the same line of business, that it would be kept busy as long as the war continued, but no definite promises were made that claimant would receive an order for 24,000 overcoats. This Board is, therefore, unable to fix the date of the agreement earlier than October 29, 1918, the date stated in the contract itself, and the date mentioned in the Form C certificate issued by the Claims Board, Office of the Director of Purchase.

2. Claimant should be allowed for losses incurred on raw material purchased on the faith of the agreement dated October 29, 1918, which will include only the losses incurred on a sufficient quantity of the material enumerated in paragraph 13 of the Findings of Fact for the manufacture of 24,000 new model overcoats. These purchases exceeded the quantity required to make these overcoats. For instance, the quantity of mercerized thread is greatly in excess of the amount needed. This will, of course, reduce the amount originally allowed for losses on raw material by the Claims Board, Office of Director of Purchase.

3. Following the decision of the Secretary of War in the claim of the Pennsylvania Tank Car Co. (150-C-1829), claimant is allowed three months rent after November 22, 1918, the date claimant received suspension notice on all its Government contracts, covering the following properties which were held exclusively for the contract involved in this decision:

Third loft at 8 East Twelfth Street;

Third loft at 88-94 Rockaway Avenue;

Part of sixth floor at 30 Main Street.

4. It is impossible to allow claimant the sums alleged to have been spent for salaries in connection with this contract. Claimant has failed to show that the labor and office help, presented in this claim, was held exclusively for this contract. In fact, claimant was working on other Government contracts until February 21, 1919, and possibly later than that date. The parties whose salaries are presented in the claim were, no doubt, employed upon other Government contracts, and it is the opinion of this Board that the claim for this portion of the overhead must be denied.

DISPOSITION.

A copy of this decision will be transmitted to the Purchase Section, War Department Claims Board, for appropriate action.

Lieut. Col. McKeeby and Capt. Morgan concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

JANUARY 20, 1921.

Case No. 3044.

In re **CLAIM OF THE KALBFLEISCH CORP.**

1. **MISTAKE—REFORMATION OF CONTRACT UNDER ONE.**—The Secretary of War can only reform contracts on the ground of mistakes under such circumstances as would justify a court of equity in reforming a contract.
2. **SAME.**—In order to justify the reformation of a contract on the grounds of mutual mistakes the testimony must be clear and cogent and must establish a mutual mistake of a fact having a present or past existence and must show that at the time of the execution of the contract the parties intended to say a certain thing and by mistake expressed another.
3. **CLAIM AND DECISION.**—Claim for presumably \$40,000 on appeal from the decision of the Claims Board, Ordnance Department, in refusing to reform two settlement contracts. Held, claimant is not entitled to reformation.

Maj. Hill writing the opinion of the Board.

This is an appeal from the action of the Ordnance Section in declining to re-form two settlement contracts executed by claimant and the United States. The only items in controversy are alleged commitments of claimant for nitrate of soda to W. R. Grace & Co.

A hearing has been had before this section.

FINDINGS OF FACT.

1. Claimant alleges that it entered into two agreements with W. R. Grace & Co., the first on or about September 12, 1917, and the second on or about October 11, 1917, by the terms of which it purchased specific quantities of South American nitrate of soda at a fixed price. The two memorandums of sale offered in support thereof are signed by W. R. Grace & Co. only.

2. Under date October 16, 1918, claimant entered into two formal contracts with the Ordnance Department, Nos. War Ord. P16498-1533E and P16553-1536E, whereby claimant agreed to furnish fixed quantities of nitric acid at a fixed price, subject to revision. The contracts provided that the nitrate of soda from which the acid was to be made should be furnished by the United States.

3. Upon suspension of these contracts, claimant sought reimbursement among other items for loss on its nitrate of soda agreements with Grace & Co. due, as it alleges, to the fact that it was prevented from using this nitrate of soda because the Government by the terms of its contracts furnished the necessary nitrate of soda.

4. This claim was filed covering a number of items with the New York district claims board. The date of the suspension notice does not appear but claimant states that work was terminated on December 13, 1918. Settlement contracts were executed by claimant by its vice president, Alfred L. Savage, and on the part of the United States by Maj. George Featherston, Ordnance Department, contracting officer, allowing to claimant, among other items, on account of the W. R. Grace & Co. nitrate of soda contracts, in contract No. P16498-1533E, \$10,591.42 and in contract P16553-1536E, \$30,524.36. These settlement contracts by their terms required the approval of the Ordnance Claims Board before they should become valid and binding obligations of the United States.

5. The Ordnance Claims Board declined to approve these contracts because of the inclusion of the W. R. Grace & Co. items. New settlement contracts dated December —, 1919, were then drawn eliminating the amounts of the W. R. Grace & Co. items and inserting a provision in contract No. P16490-1533E in part as follows:

“3. * * * such settlement when made shall constitute a complete determination of every question or claim, legal or equitable, liquidated or unliquidated, by or on behalf of the contractor, pertaining to or growing out of said original contract except to the extent provided for in paragraph 1 hereof and except to the extent and in the amount of the recovery, if any, which may be had in an action at law, prosecuted to final judgment by W. R. Grace & Company against the Kalbfleisch Corporation to recover the amount claimed by W. R. Grace & Company against Kalbfleisch not to exceed nine thousand four hundred and thirty-one dollars and eighty-one cents (\$9,431.81) by reason of certain alleged agreements, dated September 12, 1917, and October 11, 1917, for the delivery of nitrate of soda by W. R. Grace & Company to the Kalbfleisch Corporation, and

“The Kalbfleisch Corporation agrees to defend and resist any such action at law and to afford to the United States full right and opportunity of intervening or appearing through counsel in the defense of any such units or suits. In the event of the recovery by W. R. Grace & Company of a final judgment against the Kalbfleisch Corporation in such action or actions at law so defended, the United States will pay, in addition to the amount hereinbefore specified, the amount of such judgment or judgments, together with interest and all taxable costs, but the United States shall not be obligated to reimburse or to pay to the Kalbfleisch Corporation any sum which may be recovered in an action at law by W. R. Grace & Company against the Kalbfleisch Corporation in excess of nine thousand four hundred and thirty-one dollars and eight-one cents (\$9,431.81, exclusive of interest and taxable costs) or any counsel fees, expense, or other items of disbursement incidental to the defense of said action or actions at law.”

In contract P16553-1536E a similar provision was inserted except that it limited the extent of the liability of the United States for any judgment secured by W. R. Grace & Co. to \$30,364.90.

6. Under date of December 4, 1919, these new settlement contracts were forwarded to the New York district claims board for execution by the contractor. They were returned by the district claims board on December 9, 1919, to the Ordnance Claims Board, executed by claimant, by its vice president, Alfred L. Savage. The contracts were executed on the part of the United States by Lieut. Col. R. H. Hawkins, Ordnance Department, contracting officer. They were approved by the Claims Board under date of December 5, 1919.

7. Under date of December 30, 1919, claimant wrote the New York district claims board (copy to the Ordnance Claims Board) regarding these two settlement contracts in part as follows:

"We found to our astonishment yesterday that we signed these papers in an entire misconception of the facts and we hereby advise you that we will not accept a settlement of either claim in accordance with the changed terms."

The letter then stated that claimant, before the execution of these settlement contracts had been pressed by Grace & Co. to take the balance of the tonnage of nitrate of soda and had paid Grace & Co. on the quantity of nitrate of soda contracted for in September and October, 1917, but not taken the difference between the contract price and the market price soon after the armistice. Claimant offered at the hearing photostat copies of five checks, dated from May 9 to September 12, 1919, making payments to Grace & Co. of an aggregate sum of \$37,664.21. Claimant offered no evidence as to the facts surrounding its execution of the final settlement contracts in issue other than its letter of December 30, 1919.

8. The final settlement contracts were executed for the United States by Lieut. Col. R. H. Hawkins, Ordnance, as contracting officer. Col. Hawkins testified that he drafted the clause in controversy requiring that the Grace & Co. claim be reduced to a judgment before payment by the United States. He stated that it was his idea that the liability of the Kalbfleisch Corporation to Grace & Co. was for many reasons so doubtful, so questionable, that it should be established in an action of law before payment by the United States and that that was the purpose for which the paragraph in question was inserted. Col. Hawkins testified that he was also a member of the Ordnance Claims Board at the time he executed these contracts, that he knew at that time, from the transcript of the testimony of claimant's Mr. Sheldrick before the New York district claims board in the file before him, that claimant had paid to Grace & Co. about half of the amount claimed by Grace & Co., but that he did not know that the entire amount had been paid.

DECISION.

1. The only question for decision before this section is whether or not claimant is entitled to reformation of the two settlement contracts executed in December, 1919.

2. Claimant in effect seeks reformation of the settlement contracts, alleging that it executed them without knowledge that they contained the so-called "Grace" clause, and that the officer executing on the part of the Government did not know at the time that claimant had made full settlement with Grace & Co.

3. Where a contractor seeks reformation of a contract on the ground of mistake, the contractor must show that the mistake is mutual. Claimant knew that it had made full settlement with Grace & Co. The Government did not know this. There is no mutuality of mistake in this. On the other hand, the Government knew that the so-called Grace clause was in the settlement contracts and so intended. Claimant did not know it. Again there is no mutuality. A mistake justifying reformation must be mutual and common to both parties to the instrument. It must appear that both have done what neither intended.

4. The power of the Secretary of War to reform contracts can be exercised only where the mistake is such as would justify a court of equity in reforming a contract. In order to afford sufficient ground for reformation there must be either a mutual mistake of fact or a mutual mistake of law. There is no contention here as to a mutual mistake of law.

"By mutuality (of mistake) is not meant that both parties must agree on the hearing that the mistake was in fact made, but the evidence of the mutuality of the mistake must relate to the time of the execution of the instrument, and show that at that particular time the parties intended to say a certain thing and by a mistake expressed another." (34 Cyc., 919.)

In *Travellers Ins. Co. v. Henderson*, 69 Fed., 762, 767, the court said:

"But a court of equity will not reform a written agreement when, by so doing, it would impose on one of the parties obligations which he never intended or agreed to assume. It is of the very essence of the rule that a mistake relied upon to secure the reformation of a written contract must be mutual, and that the contract as reformed must express the very terms of a previous agreement which the parties actually made and intended to reduce to writing."

5. In the claims of Cleveland Crane & Engineering Co., Nos. 2309 and 2310 (6 Dec. Bd. Cont. Adj., Part 2, 98), the Board held that:

"In order to justify the reformation of a contract on the grounds of mutual mistake the testimony must be clear and cogent and must establish a mistake of a fact having a present or past existence and

must show that at the time of the execution of the contract the parties intended to say a certain thing and by mistake expressed another."

This decision, on appeal, was affirmed by the Secretary of War. The principle here stated has been consistently adhered to by this section.

6. In the present case, the proof shows that Lieut. Col. Hawkins intended to execute precisely such a contract as was written, and in conformity with the action of the Ordnance Claims Board.

7. There is insufficient proof to determine the facts surrounding execution of contract by claimant. It is true that the so-called "Grace" clause is stated so clearly and precisely that even a single reading would not fail to inform claimant of its full purport and effect.

8. In Storey, Eq. Jour. 13th Edition, page 226, it is said:

"Courts of equity do not sit for the purpose of relieving parties under ordinary circumstances who have failed to exercise reasonable diligence and discretion."

In *Grimes v. Sampson*, 93 U. S., 55, it was held that a mistake which was the result of a want of proper diligence is not sufficient to relieve a party from a contract he has made. The court said:

"A mistake, to be available in equity, must not have arisen from negligence. Where the means of knowledge is easily accessible, the party complaining must have exercised at least the degree of diligence 'which may be fairly expected from a reasonable person.' (Kerr, Fraud and M., 407.)"

9. In the claim of C. R. Wilson Body Co., No. 2465 (5 Dec. Bd. Cont. Adj., 369), the Board held that a settlement contract will not be reformed on the ground of mistake where the alleged mistake was due to failure to exercise reasonable diligence on the part of the party seeking reformation.

10. From the facts and the law as above stated, this section is of the opinion that claimant has failed to set up grounds upon which a court of equity could reform the settlement contracts, and that it is beyond the jurisdiction of the Secretary of War to grant relief.

11. The decision of the Ordnance Claims Board declining to further consider the matter in question is affirmed, and relief is denied.

DISPOSITION.

The Appeal Section transmits its decision to the Ordnance Section for appropriate action.

Lieut. Col. McKeeby and Lieut. Tabb concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

JANUARY 24, 1921.

Case No. 3036.

In re **CLAIM OF THE SNARE & TRIEST CO.**

1. **EVIDENCE.**—Parol evidence will not be considered where it is sought to vary the plain and unambiguous terms of a written instrument.
2. **JURISDICTION.**—Where a formally executed contract is terminated by a full performance the Secretary of War is without jurisdiction to entertain or to adjust a claim arising thereunder except where such claim arises by reason of "doubts and disputes as to the meaning of the terms contained in the contract."
3. **CLAIM AND DECISION.**—This claim for \$1,710 was originally submitted for decision to the chief of the Construction Service, who recommended that the claim be denied. Upon appeal to the War Department Claims Board, Appeal Section, the decision of the chief of the Construction Service is affirmed. Held, relief will be denied.

Maj. Blackburn writing the opinion of the Board.

FINDINGS OF FACT.

1. This is an appeal from a decision of the Chief of Construction Service, United States America, on a claim for \$1,710 on a formally executed contract under the following circumstances:

2. Prior to the 6th day of September, 1918, The Snare & Triest Co., of Philadelphia, Pa., were engaged under a formally executed contract in certain construction work at the Philadelphia quartermaster's terminal at Philadelphia. Owing to the nature of the work at the time, and in order that the work be carried forward with all expediency, it became necessary to secure the services of a certain steam shovel, in addition to that number which were then being employed by claimants.

3. On the 6th day of September, 1918, claimants entered into an agreement with the firm of McDonnell Bros., 2313 South Front Street, Philadelphia, Pa., for the rental of "one Thew steam shovel, $\frac{3}{4}$ -yard dipper," at a daily rental of \$30 per day, said rental to begin on the day when the steam shovel was moved on the job. Pursuant to this agreement, McDonnell Bros. immediately moved their shovel to the point where the work was to be done. On the same day

claimants tendered to McDonnell Bros. the following instrument for their signature:

"R-143.

"The Snare & Triest Co. hereby leases from McDonnell Bros., 2313 S. Front St., Phila., Pa., 1 Thew steam shovel, $\frac{3}{4}$ -yard dipper (Govt. R-No. 143), at a daily rental of \$30 per day, from the 6th day of September, 1918.

"Said lease to continue until terminated by The Snare & Triest Co.

"The cost of transportation to and from Philadelphia quartermaster's terminal to be borne by The Snare & Triest Co.

"All insurance covering the said steam shovel to be carried by the said McDonnell Bros.

"Rental will be paid weekly, as promptly as Government payments permit.

"Accepted.

THE SNARE & TRIEST CO.
By F. J. LITTLE, *Elec. Eng.*

"Accepted.

MCDONNELL BROS.
By JAMES T. MCDONNELL."

4. Before McDonnell Bros. signed this instrument they directed the attention of the representative of the Snare & Triest Co. to the fact that the length of the working day was not stipulated in the written instrument. It was then and there agreed between Mr. Wm. H. Kern of the claimant company and Mr. John T. McDonnell of McDonnell Bros. that 10 hours would constitute a working day for the steam shovel, and pursuant to this understanding the written instrument was amended by inserting the words "of ten hours per day" between the words "per day" and "from" in the first paragraph of the rental contract.

5. The Snare & Triest Co. assumed charge and control of the steam shovel, and continued in such charge and control from September 6, 1918, to March 18, 1919, during which time the steam shovel was operated by certain crews in the employ of the claimants. Evidence is developed by claimants that in addition to working the machine the 10-hour day shift, the shovel was operated on double shifts, that is to say, that upon the completion of the 10-hour shift of the day crew, a night crew would take charge of the machine and operate it for an additional period of time. It is further developed in evidence that at the time when the rental contract was amended and signed by McDonnell Bros. that Mr. John J. McDonnell requested of Mr. Kern of the Snare & Triest Co. that some arrangement be made whereby the owners of the shovel (McDonnell Bros.) would be paid for such overtime as the shovel was put to, at the same rate of rental stipulated in the rental contract. In response to this statement by Mr. McDonnell Mr. Kern testifies positively that

he has no recollection of making such an arrangement or having such an understanding with the McDonnell Bros.

6. It is disclosed by the record that the shovel was used in overtime for a period of approximately 57 days. That such operation was under direction and at the instance of the Snare & Triest Co. is established by the testimony of Peter Richie, Thomas E. Mutch, Frank Rascento, and Rea Keech, all of whom were employees of the Snare & Priest Co., and who operated the shovel under direction of the Snare & Triest Co.'s superintendent.

7. The McDonnell Bros. have been paid by the Snare & Triest Co. for the time the steam shovel was on the job at the quartermaster's Philadelphia terminal, with the exception of the overtime which is now claimed for.

8. The Snare & Triest Co. in the light of the testimony of Mr. William W. Kern have at no time prior to the filing of this claim with the War Department for and on behalf of the McDonnell Bros. made any request for settlement or adjustment for any amount due them by reason of the operation of the steam shovel for the 57 days of overtime.

DECISION.

1. In the decision of the Chief of the Construction Service, there appears to be a full and complete discussion of the various questions of fact involved in this case. From that decision the claimant now appeals to the Appeal Section, War Department Claims Board.

2. We have reviewed carefully the findings and recommendations in the decision of the board below, and are of the opinion that it should be sustained. However, the board below having confined itself to the consideration of the various questions of fact, leaves open the questions of law involved. There appear to be two questions which we deem to be most pertinent and which must be determined by application, to the first, the well-established laws of contracts, and to the second, the jurisdictional rules and orders which confine within certain limitations the authority of the Secretary of War in the adjustment and settlement of Government contracts. We will first consider the contract law of the land as applicable to the facts here presented.

3 There is presented in this case a situation which is striking in its peculiarities. The Snare & Triest Co. are but nominal claimants here, and submit to this Board the claim of the real parties in interest, McDonnell Bros., who, in order to make effective their position, are perforced to be in disagreement with the very agency through which only they may speak. It is contended by McDonnell Bros. that the agreement, in effect, was that they were to be

paid at the rate of \$30 per day, 10 hours per day, for every day their steam shovel was on the work at the Philadelphia terminal, and, in additon, they were to be paid at the rate of \$30 per day for all overtime during which the shovel was used. The Snare & Triest Co. specifically states, through their Mr. Wm. H. Kern, that there was no agreement or understanding with McDonnell Bros. by which they were to be paid for overtime.

4. Thus we have the nominal claimant (the prime contractor) and the real parties in interest (the subcontractor) at variance concerning a vital issue in this case.

5. It is fundamental that where the parties to a contract are in disagreement as to its terms the courts will look to the writing itself.

6. We are at the outset confronted with a writing in which are expressed in plain language, free from ambiguities, the condition and agreements between the parties thereto. It being the obvious purpose of McDonnell Bros., through the mouth of the nominal claimant, to change the purport of that agreement and to read into it, by parol testimony, matters and understandings not appearing on its face, we can not but question the relevancy of the evidence of J. F. McDonnell in this connection.

7. It seems to us that the whole of the agreement having been reduced to writing and signed by the parties, that all of their understandings of the undertaking should have been incorporated in the contract prior to execution. If the writing did not set forth the true understanding of one of the parties thereto it was his duty to have seen to it that it did. The contract was changed at the instance of McDonnell Bros. in order that the length of the working day for the shovel should be clearly and definitely stipulated. However, no amendment was made in the instrument which specified the manner and terms of payment for overtime. This, McDonnell Bros. now seek to establish by parol testimony, alleging that they not only insisted upon this provision but understood that this arrangement had been agreed upon. If it was in the minds of McDonnell Bros. that they should receive payment for overtime *they should have insisted upon this change being made in the contract*, and if such change was refused by the Snare & Triest Co. the McDonnell Bros. should not have signed the paper.

8. The contract having been executed and the work having proceeded to completion under the terms therein stated, McDonnell Bros. may not now be heard to say that the contract did not contain all of their understanding, nor will this Board violate the well-known rule of evidence established, both by text and decision, in giving consideration to evidence resting wholly in parol, to contradict or vary the terms of a valid written agreement. If the contract did not contain such provisions and stipulations as were contemplated

by McDonnell Bros., it was their folly to have signed the contract. They, having done so, are bound fully and completely by the terms of the writing, and their cause before this Board must be adjudged and determined according to the provisions of the writing which they have executed.

9. Considering the second or jurisdictional question, relief may well be denied because both the contract between the Snare & Triest Co. and the United States and the Snare & Triest Co. and McDonnell Bros. are formally executed instruments, and which have in each instance been completed by full performance. There does not appear to be involved in this case any question of "doubt or dispute as to the meaning or interpretation of anything contained in these contracts." It would therefore seem that the Secretary of War is without jurisdiction to entertain this case under G. O. 103-W. D. 1918.

10. For the foregoing reasons, which we believe to be a correct exposition of the law involved in the instant case, we affirm the decision of the Chief of the Construction Service denying payment in the amount claimed for, under date of September 8, 1920, and the relief prayed for in claimant's petition is denied.

DISPOSITION.

The War Department Claims Board, Appeal Section, will enter an order denying relief.

Lieut. Col. McKeeby and Capt. Marcum concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

JANUARY 24, 1921.

Case No. 3055.

In re **CLAIM OF WESTERN CARTRIDGE CO.**

1. **MERGER OF NEGOTIATIONS IN WRITTEN INSTRUMENT.**—In the absence of duress, fraud, or mistake of fact prior oral negotiations are merged in the subsequent written instrument signed by the parties, and it makes no difference that the instrument was proxy-signed on the part of the United States.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$140,357.30 based upon a proxy-signed contract for the manufacture of cartridges. Held, claimant is not entitled to relief. (See decision, case No. 2785, decided August 10, 1920, Vol. VII, p. 359, and Vol. VIII, p. 234.

Maj. Hill writing the opinion of the Board.

This is a claim under the act of March 2, 1919. Statement of claim, Form B, was filed December 28, 1920, for \$140,357.30, by reason of an agreement alleged to have been made between claimant and the Ordnance Department for expense of transforming and rearranging its plant for the production of 8 mm. cartridges.

A hearing has been had upon this claim.

FINDINGS OF FACT.

1. The facts are fully stated in the decision of the Appeal Section dated August 10, 1920, in case No. 150-C-2785, which was for the identical items here claimed. At the hearing on the present claim it was stipulated that the transcript of testimony taken in claim No. 2785 should be considered as a part of the testimony. The only witnesses at the hearing of the present claim testified at the previous hearing and the testimony substantially accords with that of the previous hearing. The decision in case No. 2785 denied relief on the ground that the agreement alleged became merged in a proxy-signed contract which contained a provision that the items claimed should be performed by claimant without cost to the United States.

2. In presenting this claim claimant's counsel stated:

"The matter is now presented, it is the same claim, but it is presented upon a different theory; that is, on the theory that the original claim was filed upon, but not upon the theory that this board considered it on."

3. Claimant, in the latter part of 1917, was engaged upon contracts for the manufacture of .30 caliber cartridges for the United States. While performing these contracts claimant received a letter from the Chief of Ordnance, dated December 10, 1917, directing claimant to proceed with preparations for and the manufacture of 80,000,000 8-mm. cartridges and stated that formal contract would follow.

4. The proxy-signed contract No. 16383, dated February 26, 1918, for the manufacture of 80,000,000 8-mm. cartridges provided in paragraph 7, of article 3, in part as follows:

“ * * * The contractor agrees to make the necessary changes in the rearrangement of its plant, machinery, and tools to accommodate such of the additional machinery furnished by the United States as is utilized for the purposes of this contract, and to adapt said plant, machinery, and tools, and said additional machinery to the purposes of this contract, and to replace the same at the termination of the contract in condition for the manufacture of caliber .30 ball cartridges without cost to the United States.”

5. The negotiations for this contract covered several months. They were conducted for the Ordnance Department by Maj. Hayden Eames, Ordnance Department, in charge of the production of small arms and small-arms ammunition, assisted by Maj. F. B. Clark, Ordnance Department. Maj. Eames instructed Maj. A. M. Holcomb, Ordnance Department, chief of the contract department of the Small Arms Division, to proceed with the preparation of the contract. At the hearing on claim No. 2785 Maj. Eames testified that at some time during the negotiations before the execution of the contract, he assured claimant's president, Mr. Olin, that the Government would protect him in the losses which would result from transforming his plant from the manufacture of one type of cartridge to the other. Before the contract was executed the functions of Maj. Eames changed in a reorganization of the Ordnance Department, and he no longer had any concern in the drafting of the contract. The contract was later executed for the Ordnance Department by Col. Samuel McRoberts, by Lieut. Col. Charles N. Black. For a period of about a month prior to the execution of the contract it does not appear that there were any negotiations between claimant and the Ordnance Department nor does it appear who conducted the final negotiations on the part of the United States.

DECISION.

1. This claim might well be denied on the ground that it is the identical claim denied in case No. 2785, which denial was affirmed on appeal by the Secretary of War. Claimant concedes that it is the same claim, but insists that it is here presented on a theory different from that upon which it was before considered by this section and denied. In order, however, that claimant may receive every consideration and

have no complaint, the claim is here considered upon its merits and upon the theory now presented.

2. Claimant has endeavored in this claim to take out a portion of the oral negotiations leading up to the execution of the contract dated February 26, 1918, so that standing alone and unrestricted by the execution of the contract there could be found an informal agreement under the act of March 2, 1919. Such a course might have been successful if the negotiations had not resulted in the written contract containing the express provision as to these very matters, which claimant seeks to set up here as an independent agreement.

3. It is our opinion that claimant has offered no proof of any agreement outside of the negotiations leading up to the execution of the contract dated February 26, 1918, and can not escape from the well established rule that the negotiations became merged in the written contract wherein is found an express agreement that the items here in controversy should be performed by claimant without cost to the United States.

4. It is our opinion that claimant is not entitled to the relief sought and relief is accordingly denied.

DISPOSITION.

The Appeal Section transmits its decision to the Ordnance Section.

Lieut. Col. McKeeby and Lieut. Tabb concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

JANUARY 25, 1921.

Case No. 3047.

In re **CLAIM OF SNARE & TRIEST CO.**

- 1. NEGOTIATIONS MERGED IN WRITTEN CONTRACT.**—Where abandonment of work done by the Government was discussed between the subcontractor and the constructing quartermaster prior to the execution of the subcontract relative to what schedule of percentages should be allowed in case the work was abandoned, and the subcontract is silent as to abandonment of the work, all prior discussions and negotiations are merged into the signed contract which expresses the meeting of the minds of the parties.
- 2. CONTRACTS, PAROL TESTIMONY NOT ADMISSIBLE TO VARY.**—Parol evidence will not be admitted for the purpose of modifying or varying the terms of a written instrument.
- 3. CLAIM AND DECISION.**—This claim for \$3,800 was originally submitted for decision to the Chief of the Construction Service, who recommended that the claim be denied. On appeal to the War Department Claims Board, Appeal Section, the decision of the Chief of the Construction Service is affirmed. Held, relief will be denied.

Maj. Blackburn writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim, amounting to \$3,800, comes before the Appeal Section, War Department Claims Board, on appeal under the provision of G. O. 103, War Department, 1918, and is presented by Snare & Triest Co., prime contractor, for and in behalf of the E. S. Downes Co., subcontractor. The claim was originally filed with the Construction Division April 7, 1920, and was disallowed by that division April 9, 1920. A hearing has been conducted by the Appeal Section at which claimant and its counsel were present.

2. On July 22, 1918, the Snare & Triest Co. entered into a contract with the United States for the construction of a quartermaster terminal at Philadelphia, Pa. In Article III of this contract it is provided:

“**DETERMINATION OF FEE.**—As full compensation for the services of the contractor, including profit and all general overhead expense, except as herein specifically provided, the contracting officer shall pay to the contractor in the manner hereinafter prescribed a fee to

be determined at the time of completion of the work from the following schedule, except as hereinafter otherwise provided:

"If the cost of the work is \$100,000 or under, a fee of 7% of such cost.

"If the cost of the work is over \$100,000 and under \$125,000, a fee of \$7,000.

"If the cost of the work is over \$125,000 and under \$145,000, a fee of 6½%."

3. Subparagraph "f" of Article VI of the contract reads as follows:

"(f) In every subcontract made in accordance with the provisions hereof, require the subcontractor to agree to comply fully with all the undertakings and obligations of the contractor herein, excepting such as do not apply to such subcontractor's work."

4. Abandonment of the work was provided for in Article VIII of this contract as follows:

"ABANDONMENT OF WORK BY CONTRACTING OFFICER.—If conditions should arise which in the opinion of the contracting officer make it advisable or necessary to cease work under this contract, the contracting officer may abandon the work and terminate this contract. In such case the contracting officer shall assume and become liable for all such obligations, commitments, and unliquidated claims as the contractor may have theretofore, in good faith, undertaken or incurred in connection with said work; and the contractor shall, as a condition of receiving the payments mentioned in this article, execute and deliver all such papers, and take all such steps as the contracting officer may require for the purpose of fully vesting in him the rights and benefits of the contractor under such obligations or commitments. The contracting officer shall pay to the contractor such an amount of money on account of the unpaid balance of the cost of the work and of the fee as will result in the contractor receiving full reimbursement for the cost of the work up to the time of such abandonment, plus a fee to be computed in the following manner: To the cost of the work up to the time of such abandonment shall be added the amount of the contractual obligations or commitments assumed by the contracting officer and such total shall be treated as the cost of the work upon which the fee shall be computed in accordance with the provisions of Article III hereof. When the contracting officer shall have performed the duties incumbent upon him under the provisions of this article, the contracting officer and the United States shall thereafter be entirely released and discharged of and from any and all demands, actions, or claims of any kind on the part of the contractor hereunder or on account hereof."

5. On September 16, 1918, Snare & Triest Co., the prime contractor, entered into a contract with the E. S. Downes Co. as subcontractor, in which the following provisions appear:

"Whereas the parties hereto have agreed that the subcontractor shall for and in the stead of the contractor fulfill and perform such part of said principal contract as is hereinafter set forth; and

"Whereas the subcontractor has read and is familiar with each and every part of said contract, and the respective rights, powers,

benefits, and liabilities of the contractor and the Government thereunder:

"NOW, THEREFORE, THIS CONTRACT WITNESSETH, That in consideration of the premises and of the payments to be made as hereinafter provided, the subcontractor hereby covenants and agrees to and with the contractor as follows:

"I. The subcontractor shall in the shortest possible time furnish the labor, materials, tools, machinery, equipment, facilities, and supplies and do all things necessary for the construction and completion of the following work: Permanent and temporary electric lighting & power."

6. Article II of this subcontract reads as follows:

"In the performance of said work the subcontractor binds himself to the contractor and to the United States of America to comply fully with all the undertakings and obligations of the contractor, excepting such as do not apply to such subcontractor's work, as are set forth in the principal contract made and entered into on the 22 day of July, 1918, by and between the contractor and the United States of America. Said principal contract is hereby adopted and made a part of this contract, and a copy thereof is hereto attached."

7. In Article III of the subcontract it is provided:

"it being the intent and purpose of the parties hereto, except as herein expressly provided, to place the contractor in the same position in regard to this contract which the United States of America occupies in the principal contract, and to place the subcontractor in the same position in regard to this contract which the contractor occupies in said principal contract."

8. The subcontract is in the usual printed form prepared by the Government. However, before it was signed, Article VI was altered by Col. E. B. Morden, constructing quartermaster at the Philadelphia quartermaster terminal, who approved the subcontract for and on behalf of the United States, by striking out the following:

"fixed according to the schedule contained in Article III of the principal contract, hereto attached, and shall not exceed the fee which, under said schedule, would be allowed the contractor for the work hereby included, if said work had been done under a direct and separate contract. The provisions of a principal contract shall govern the manner and time of determining the amount to be paid to the subcontractor if and when the same shall have been determined, allowed, and actually paid by the contracting officer to the contractor but the total fee to the subcontractor hereunder shall not exceed \$_____."

and substituting therefor the following:

"fixed according to the following schedule except as hereinafter otherwise provided:

"If the cost of the work is \$100,000 or under, 5%.

"If the cost of the work is over \$100,000 and under \$111,000, \$5,000.

"If the cost of the work is over \$111,000 and under \$200,000, 4½%.

"If the cost of the work is over \$200,000 and under \$225,000, \$9,000.

"If the cost of the work is over \$225,000 and under \$300,000, 4%.

"If the cost of the work is over \$300,000 and under \$342,000, \$12,000.

"If the cost of the work is over \$342,000 and under \$400,000, 3%.

"If the cost of the work is over \$400,000 and under \$466,000, \$14,000.

"If the cost of the work is over \$466,000 and under \$500,000, 3%.

"If the cost of the work is over \$500,000, \$15,000.

"Any buildings required to house electrical apparatus will be built by the general contractor and the cost will not be included in the cost of the electrical work under this contract.

"The cost of materials purchased or furnished the contracting officer for said work, exclusive of all freight charges thereon, shall be included in the cost of the work for the purpose of reckoning such fee to the subcontractor, but to no other purposes.

"The fee for reconstructing and replacing any of the work destroyed or damaged shall be such percentage of the cost thereof, not exceeding seven (7%) per cent, as the contracting officer may determine.

"The total fee to the subcontractor shall in no event exceed the sum of fifteen thousand (\$15,000) dollars."

This alteration was with the full knowledge and understanding of all parties to the contract. The subcontract does not contain any clause providing for or authorizing any abandonment or curtailment of the work.

9. On February 24, 1919, the Government abandoned or curtailed the work on two of the piers, and the prime contractor, Snare & Triest Co., in turn, curtailed the same work and notified the subcontractors accordingly, including the E. S. Downes Co. The prime contract and the subcontract have been completed by performance except as to so much of the work as was abandoned, and the E. S. Downes Co. has received the sum of \$11,200 as payment in full in accordance with the terms of the subcontract for all work performed and this claim is for the difference between the amount so received and the maximum fee of \$15,000 stipulated in the subcontract.

10. The prime contract contains the usual clause providing for settlement of doubts or disputes by the Secretary of War as to the meaning or interpretation of anything appearing in the contract.

11. It is the contention of claimant, and Mr. Edgar S. Downes, president of the E. S. Downes Co., testified that at the time of the alteration of the subcontract by Col. Morden, referred to in paragraph 8 above, the question of the work going to completion was discussed between them and that Col. Morden assured him that the work would be rushed to completion, it being estimated that it would take approximately eight months to finish it. At that time no one had any idea of the war ending as soon as it did. During the discussion, extending over a period of several days, Mr. Downes testified that he was given to understand by Col. Morden that in case the work was abandoned, or did not go to completion, he would be compensated for all work performed on the basis of the schedule of percentages enumerated in Article III of the original contract.

"Mr. KERN. So that when you accepted that contract on those statements you believed that you were going to receive a fee of \$15,000 for the work?"

"Mr. DOWNES. Yes, sir; that is the basis.

"Mr. KERN. Had you known or believed that that was not the fact, would you have accepted that contract?"

"Mr. DOWNES. No, sir."

Col. Morden testified that there was a lot of discussion, one or two prior meetings, as to what would happen in the event the work was suspended.

"I simply, to close this discussion, said 'you have got your original contract to fall back upon,' is about the way I remember it."

* * * * *

"Maj. BLACKBURN. Did you make any direct reference, in this discussion with Mr. Downes, to the effect that in case of abandonment or curtailment he would be paid according to the schedules outlined in Article III of the prime contract?"

"Mr. MORDEN. I do not know that I did in that many words, but, as I have said before, I undoubtedly told him—I am quite sure I did—that if by any possibility it was curtailed, he had the prime contract to fall back on. I do not know what my exact words may have been."

The attention of this witness was directed to the eliminated portion of Article VI of the subcontract, as is shown in paragraph 8 above, and the schedule of percentages substituted therefor, and he was asked:

"Maj. BLACKBURN. If it had been the intention that the subcontractor should have been settled with under the terms of the principal contract, would you explain how it is that that very clause was canceled out of the contract?"

"Mr. MORDEN. As I remember that my only thought at that time was that the job was going to completion, that I was fixing the maximum fee that could be made on the completed job, and that I was not contemplating any curtailment at that time."

12. In developing this case counsel for claimant stated:

"You are confronted here, Major, with a very complicated proposition. * * * You are confronted here with a situation where a man is asking for a greater compensation for not completing the amount that he originally intended to complete than he would have received had the entire work been finished."

* * * * *

"We are confronted here with the unusual condition, which I will explain later, of a man receiving more for not completing work than he would have been entitled to receive under his contract if the work was completed. There is no doubt about that. It is an unusual situation."

DECISION.

1. In so far as the work called for in the subcontract is concerned, the prime contract is referred to and adopted "except as herein

expressly provided." The subcontract expressly eliminates the schedule of percentages as provided in Article III of the prime contract and substitutes in lieu thereof an entirely different scale of percentages. The abandonment clause of the original contract, substituting the scale of percentages set out in Article VI of the subcontract, became a part of the subcontract. If, as contended by claimant, but which we do not concede, the abandonment clause of the original contract (Article VIII) became a part of the subcontract, then the matter of settlement referred in that article in which reference is made to the schedule of percentages set out in Article III must be considered in the light of the substituted scale of percentages as provided in Article VI of the subcontract. The work which this subcontractor undertook to perform constituted a very small portion of the entire work contemplated in the original contract. In such circumstances it would be manifestly unfair to the Government to hold that, in case of abandonment of the work, the subcontractor should be settled with upon the same scale of percentages and allowances as the prime contractor. The subcontractor is chargeable with knowledge, and, in fact, had actual notice that by the terms of the original contract, the Government expressly reserved the right to abandon the work and terminate the contract when deemed advisable in the opinion of the contracting officer and no representation or promise by the constructing quartermaster to the contrary could change or alter the prime contract in this respect. If the subcontractor regarded the matter of abandonment of the work, and, in such event, the schedules of compensation as provided in Article III of the original contract, of such vital importance that it would not have entered into the subcontract if it had not so understood the transaction, it should have insisted and required that a stipulation to that effect be incorporated in the subcontract. The stability and sacredness of signed written instruments would receive a great shock, if not total destruction, if evidence of the nature here produced is to be accepted as adding to, altering, or varying the written contract. Furthermore this Board is thoroughly committed to the recognized sound legal proposition that, in the absence of fraud, all prior negotiations and understandings are merged into the subsequent written contract. Whatever discussion and oral negotiations may have occurred between Mr. Downes and Col. Morden, the subsequent signed contract of September 16, 1918, represents the final meeting of the minds of the parties.

2. We are not convinced of any substantial difference, except as to the character of work, between the subcontract in the instant case and the subcontracts for plumbing and heating offered in evidence by this same prime contractor, Snare & Triest Co., case No. 2611, and in which this Board denied the subcontractor's relief. On ap-

peal to the Secretary of War, the decision in that case was affirmed June 29, 1920. (Vol. v, pt. 3, p. 46, these decisions.)

3. It was stated by counsel for claimant at the hearing that the position of the subcontractor here was that "of a man receiving more for not completing work than he would have been entitled to receive under his contract if the work was completed." We are unable to view with favor a proposition seeking relief based upon such a principle. The E. S. Downs Co., the real claimant, has been paid in full for all work performed by it in accordance with the provisions of its contract. The Appeal Section is, therefore, of the opinion that claimant is not entitled to relief, and the decision of the Construction Division is accordingly affirmed.

DISPOSITION.

The usual order denying relief will be issued.

Lieut. Col. McKeeby and Capt. Marcum concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

JANUARY 25, 1921.

Case No. 2296.

In re **CLAIM OF WEST COAST SHIPBUILDING CO.**

- 1. JURISDICTION—FORMAL CONTRACT TERMINATED BY CANCELLATION.—**
The Secretary of War is without jurisdiction to grant relief where a formal contract has been terminated by the United States by cancellation.
- 2. AWARD CONSTITUTES AGREEMENT.—**Where claimant was notified of an award of a contract there was an agreement within the terms of the act of March 2, 1919, even though the award was "revoked" without the contract having been signed by the United States.
- 3. BREACH OF FORMAL CONTRACT.—**The failure of claimant to furnish a performance bond as required by a formal contract constituted such a breach of the contract as authorized the United States to terminate the contract by cancellation.
- 4. WAIVER BY GOVERNMENT OF BREACH BY CLAIMANT.—**The duty in the first instance devolving upon claimant to furnish a bond, the fact that performance of a contract involving expenditures and liabilities was commenced without giving the bond and with the knowledge of the United States does not constitute a waiver of the right of the Government thereafter to insist upon the bond being given and to cancel the contract for failure or refusal to do so.

Maj. Blackburn writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts: ●

1. On June 19, 1920, the Board of Contract Adjustment rendered a decision in this case in which relief was denied claimant on the theory that the claim was presented under G. O. 103, War Department, 1918, and was based upon formally executed contracts which had been terminated by cancellation or by breach, and for that reason the Board was without jurisdiction in the premises. Mr. Hunt, who conducted the hearing, having resigned from the Board, the file and all papers in the case were delivered to Mr. Theodore Eaton, who prepared the decision.

2. A rehearing was granted in order that opportunity might be afforded claimant to offer additional evidence and secure the testimony of Gen. George W. Goethals. In its petition for rehearing claimant requested that the claim of the Warcrete Shipbuilding Co., No. 342, be consolidated and considered with the instant case, that company being in the status of a subcontractor of claimant. Except as herein

corrected and modified, the former findings of fact and decision of the Board of Contract Adjustment are approved and adopted as the findings and decision of the Appeal Section, War Department Claims Board, on this hearing.

3. Claimant received an award from the United States for the construction of 14 reinforced-concrete river boats in words as follows:

JULY 1, 1918.

From: Chief of Embarkation Service.

To: West Coast Shipbuilding Co., Everett, Wash.

Subject: Construction of river vessels.

1. In connection with bids submitted by you under date of June 25, 1918, be informed that approval has been granted for awarding you contracts to construct fourteen (14) reenforced-concrete vessels, designs of which will be approved by this office. Seven (7) of these vessels to be built at your yards in Everett, Washington, and seven (7) at Wilmington, N. C. The vessels built on the west coast to be propelled by twin distillate engines as specified, and those on the east coast by twin-screw steam engines. All machinery for proposed installations to be approved by this office. Contract will be closed through the depot quartermaster, Seattle, Washington, who will act as contracting officer. Proper bond as specified should be entered into by your firm upon entering into contract.

By authority of the Chief of Embarkation Service.

W. R. BETTISON,
Lt. Col., C. A. N. A., Assistant.

4. Following this award, two certain contracts, each bearing date June 29, 1918, were prepared by the Government for the construction of the boats. They were not executed, however, until August, 1918. Under date August 6, 1918, Lieut. Col. K. J. Hampton, Q. M. C., depot quartermaster, Southeastern Department, Charleston, S. C., addressed a letter to the Chief of Embarkation Service, Washington, D. C., paragraph 1 of which letter reads as follows:

"1. Reference letter Chief of Embarkation, file WT-561.4 (130-foot river boats), dated July 24, 1918, this office has this day entered into a contract with the West Coast Shipbuilding Co., of Everett, Wash., and Wilmington, N. C., for the construction of seven 130-foot reinforced concrete vessels at a cost of \$132,577 each."

The contract referred to in this letter is formally executed, being signed "K. J. Hampton, Lt. Col., Q. M. Corps, U. S. Army," and "West Coast Shipbuilding Co., by H. B. Spear, president." It is provided in paragraph 5 of this contract that "payments will be made monthly, as a rule, upon bills to be rendered by the contractor"; and in paragraph 1 there appears a stipulation "that payment shall be made in accordance with instructions from the supervising engineer of the water transport branch of the Embarkation Service"; and the further stipulation that "it is understood that construction of the vessels hereinbefore mentioned was commenced

on June 29, 1918." This document will be designated and referred to as the Wilmington, N. C., contract. The contract provides for the delivery of these seven vessels in accordance with the following schedule:

First vessel on the 1st day of January, 1919.

Second vessel on the 1st day of January, 1919.

Third vessel on the 1st day of February, 1919.

Fourth vessel on the 1st day of February, 1919.

Fifth vessel on the 1st day of April, 1919.

Sixth vessel on the 1st day of April, 1919.

Seventh vessel on the 1st day of June, 1919.

5. It was agreed at the hearing between the Government attorney and the counsel for claimant that all of the testimony and evidence offered on the former hearing and on the hearing in the Warcrete Shipbuilding Co. Case No. 342 should be considered and treated as having been regularly offered in evidence on this hearing.

6. A contract similar to the one described in paragraph 5, except it contained no clause as to payments being made on instructions from the supervising engineer, was prepared in the office of the depot quartermaster at Seattle, Wash. This document called for the construction of seven of the vessels at Everett, State of Washington, and was signed about August 9, 1918, by the "West Coast Shipbuilding Co., by J. B. McCoy, vice president," but was never signed by the United States or by anyone authorized to bind the United States. This document will be designated and referred to as the Everett, Wash., contract.

7. Immediately after receiving the notice of July 1, 1918, that claimant had been awarded a contract for the construction of the 14 boats, Mr. H. B. Spear, president of claimant company, went to New York and completed an arrangement with the Globe Indemnity Co. to make the performance bond required by the Government of claimant upon the execution of the contracts.

8. The need of these vessels by the War Department was urgent. Acting under directions of Maj. Van Vleck, Maj. McCrary, and Col. Bettison, all of the Embarkation Service, claimant did not wait for the execution of any formal contract, but immediately started work, after receiving notice of the award, and made commitments and incurred expenses upon the faith of same and in furtherance of the construction of the vessels.

9. About this time the United States Shipping Board took cognizance of this War Department contract for the construction of boats and then followed the controversy between the Shipping Board and the War Department, in which the Shipping Board held to the view that that board should have exclusive right over the shipbuilding program for the Government, and the control over

the labor situation and materials for that purpose. The press of the country kept the public informed of this situation between Gen. Goethals, Quartermaster General of the Army, and the Shipping Board, of which Mr. Hurley at that time was chairman. On this phase of the case certain excerpts from the testimony are deemed pertinent. Maj. Frank Van Vleck, supervising marine engineer, testified as follows:

"As soon as the contract was officially awarded the question of the bond came up and their difficulties began. Shortly thereafter—I think it was only a week or two—the Shipping Board jumped into the game and declared that the West Coast Co. could not proceed with the contracts because they would be denied priority of steel and material, and the Shipping Board themselves took the thing in hand and closed the Everett (Wash.) yard up, putting a United States marshal in the plant without any information to the War Department, which greatly displeased Gen. Hines and especially Gen. Goethals.

"Mr. HUNT. The Everett yard belonged to the West Coast Co.?

"Maj. VAN VLECK. Yes. And the result of that was their difficulties with the bond were abnormally increased. Along about that same time the other contractors—some of them were more or less in the same shape—had difficulties with their bonds. So it did not apply entirely to this one corporation. We did not know which of the corporations would pull through, whether any of them would; but in the meantime, while this matter of the bond was being agitated back and forth and the bonding companies were expressing their doubt about the advisability of taking it, why the representatives of the Warcrete Co., which had not then been formed, Mr. Darling and his representatives appeared.

* * * * *

"Mr. HUNT. I understand that they (the Shipping Board) not only did not assist you in getting these ships built, but actually obstructed you to a certain extent?

"Maj. VAN VLECK. Yes.

* * * * *

"Mr. HUNT. You gave them to understand that the energy of your department would be directed toward getting the Shipping Board to consent and perhaps assist in the accomplishment of your program?

"Maj. VAN VLECK. No; we did not at any time vouchsafe to use our influence on the Shipping Board, because we knew it would be useless.

"Mr. HUNT. Well, at any rate, you gave them to understand that the policy of your department was to get these ships built?

"Maj. VAN VLECK. Yes."

* * * * *

"Mr. HUNT. Suppose the West Coast Co. had furnished the bond and had attempted to perform, do you think they would have succeeded in performance, I mean in substantial performance, in view of the position of the Shipping Board and the difficulty about priorities, etc., or is that a too speculative question? You must have

believed at the time that there was a chance that the West Coast Co. could have performed if the bond could be secured?

"Maj. VAN VLECK. Under normal conditions, without that original opposition of the Shipping Board, I think they would have gotten through.

"Mr. HUNT. Assuming the opposition of the Shipping Board, how about it then?

"Maj. VAN VLECK. They made it very dubious, but with good financial backing I think even then they would have gotten through.

* * * * *

"Mr. HUNT. Both you and Gen. Goethals knew their situation, that their principal contractors had not furnished a bond, that there was doubt whether they could furnish a bond, and that the Shipping Board was violently opposed to their succeeding in this contract; you knew all that?

"Maj. VAN VLECK. Yes.

"Mr. HUNT. Gen. Goethals knew it all?

"Maj. VAN VLECK. Yes."

It was Gen. Goethals's desire not to in any way interfere or compete with the program of the Shipping Board, or to use labor and materials which the Shipping Board claimed they should have the prior right to in its shipbuilding program. Accordingly, he welcomed and encouraged new contractors, who had never before bid on this class of work, to submit bids on these vessels.

10. Due to this controversy between the Shipping Board and the War Department, in which the views of the Shipping Board apparently prevailed, the citizens of Everett who were backing claimant in the project, and the Globe Indemnity Co., became leery of the ability of claimant to complete its contract and declined to carry out the prior arrangement relative to making the performance bond for claimant.

11. In the meantime the Government was urging claimant to keep the work going, knowing that claimant had been unable to make the performance bond required in the proposal for the construction of the ships.

"Mr. HUNT. Well, at any rate you gave them to understand that the policy of your department was to get these ships built?

"Maj. VAN VLECK. Yes.

"Mr. HUNT. Am I to understand that you reported the situation of the Eckert crowd and the West Coast Co. at the time to Gen. Goethals with regard to the construction of these ships?

"Maj. VAN VLECK. Yes; he was advised.

"Mr. HUNT. You acquainted him with the situation?

"Maj. VAN VLECK. Yes.

"Mr. HUNT. Did he give you any instructions as to what to do in the matter?

"Maj. VAN VLECK. Yes; the general policy; yes——

"Mr. HUNT. What were his instructions?

"Maj. VAN VLECK. To urge the work to proceed.

"Mr. HUNT. And Gen. Goethals, too, directed that the work be pushed?"

"Maj. VAN VLECK. Yes."

Under date September 9, 1918, Gen. Frank T. Hines, Chief of Embarkation, addressed a letter to the depot quartermaster at Seattle, paragraph 3 of which reads as follows:

"(3). This bond delay should not allow the work to lag."

12. The Government was fully aware from the early stages of the transaction that claimant was incurring expenses, making commitments and entering into subcontracts with various business concerns for the performance of the work, and approved such action. On July 13, 1918, Mr. Spear wrote to Maj. Van Vleck as follows:

"Enclosed find list of engine awards and copy of contract with various engine manufacturers, which I hope will meet with your approval."

In reply to this letter the Chief of Embarkation, on July 31, 1918, wrote claimant as follows:

"Replying to your letter of July 13, inclosing list of engine manufacturers, contracts are approved and the detailed plans and specifications for all machinery should be forwarded to this office through the contracting officers for approval."

On July 18, 1918, the Chief of Embarkation wrote the depot quartermaster, Western Department, as follows:

"This office is sending you under separate cover five (5) copies of plans and specifications of river steamers, seven (7) of which were recently contracted for with the West Coast Shipbuilding Co. of Everett, Wash. These plans and specifications are intended for your own files, and, in addition, this office is mailing ten (10) copies to the depot quartermaster at Seattle."

On August 6, 1918, Gen. Hines, Chief of Embarkation, wired the Stetson Machine Works as follows:

"Additional set machinery plans mailed special delivery. Shafting links should suit the one hundred thirty-foot steamers, building at West Coast Shipbuilding Co. Payments on contracts are not made under the Shipping Board plan. Your agreement with West Coast Co. should be in accordance with our system of payments. Matter lies with you and the West Coast Co."

On August 22, 1918, the Union Iron Works wrote the Chief of Embarkation as follows:

"On account of the long delivery required for United States metallic packing, as specified, we ask your approval on France metallic packing, which we can obtain in such time as not to interfere with our schedule of delivery."

In reply to this letter the Chief of Embarkation wrote the Union Iron Works, under date of September 19, 1918, as follows:

"Replying to your letter of August 22, you are informed that the use of French metallic packing instead of United States packing in the compound engines being built by your firm for this office, is hereby approved."

Under date of September 10, 1918, the Chief of Embarkation wrote the West Coast Shipbuilding Co. as follows:

"1. This office is forwarding you one blueprint No. 1-199A 'Stack for 130-foot River Steamers,' forwarded to us by the Union Iron Works, Hoboken, N. J. This plan is approved, with the exception of the notations thereon.

"2. This office calls your attention to the fact that all plans from the subcontractors should be handled by your office and forwarded to this office by you. This office prefers not to recognize any subcontractors."

On September 12, 1918, Maj. McCrary, of the Embarkation Service, wrote to claimant as follows:

"1. Referring to your letter of August 5, 1918, you are hereby informed that the installation of refrigerating machines on the river steamers being constructed by your company is disapproved, and that a standard commercial ice box should be ordered in conjunction with the furniture of these vessels for installation."

Under date of September 23, 1918, Maj. Van Vleck addressed a letter to the War Industries Board asking for priorities for claimant, as follows:

"1. It is requested that arrangements be made for issuing priority to the Standard Gas Engine Co., Oakland, Calif., through their representative, Mr. Cameron, on material for subcontract for contract No. 194, Q. M. C., dated June 20, 1918, Great Northern Shipbuilding Co., 65 tons of pig and 70 tons of scrap iron.

"2. The subcontract for contract No. 182, Q. M. C., dated June 29, 1918, West Coast Shipbuilding Co., of Everett, Wash., 75 tons of pig and 90 tons of scrap iron.

"3. These materials are for construction of engines to be installed in vessels building for the War Department, and are urgently required as a war necessity.

"4. Early action in this matter is solicited."

On November 16, 1918, the Standard Gas Engine Co. wrote the Chief of Embarkation as follows:

"The West Coast Shipbuilding Co., of Everett, Wash., placed an order with us for five twin sets of main propelling engines, each engine of 300 horsepower; seven special electric service engines of 30 horsepower, for direct connection to generators, and 7 horsepower stationary engines for direct connection to pump. These orders total \$206,115.

"Before accepting this order we received confirmation of the fact that the contract had been entered into between depot quartermaster

at Seattle and West Coast Shipbuilding Co., and were assured by the engineering department of the water transport branch that we were safe in proceeding with this work.

"Seeing it reported in the press that there was controversy between the War Department and the Shipping Board over the building of these vessels, we again took the matter up with the engineering department of the water transport branch and were again assured that we were safe in continuing, and at this time were advised that these vessels were provided for by act of Congress and that it would take an act of Congress to prevent their being built * * *."

13. During this entire period the Government was aware that claimant had not executed a performance bond. Under date of October 14, 1918, Col. Bettison, of the Office of the Chief of Embarkation, wrote a letter to Mr. Spear, president of claimant, paragraphs 1 and 2 of which read, as follows:

"1. For your information it can be stated that the department has consented to reduce the amount of bonds required on recent shipbuilding contracts from 50 to 20 per cent.

"2. In view of the fact that your company was awarded contracts for the building of 14 river steamers, and that up to the present time, after the lapse of more than three months, your company has failed to execute any bond, it, therefore, is required that a bond shall be duly filed within ten days from this date, or the contract heretofore awarded will be annulled."

On the next day, October 15, 1918, Col. Bettison wrote to claimant as follows:

"1. Confirming conversation had by Mr. Spear with Gen. Hines, 14 October, 1918, you are hereby informed that the bond for the contract of the West Coast Shipbuilding Co. for the construction of said 130-foot river steamers at Everett, Wash., and said 130-foot steamers at Wilmington, N. C., must be completed by October 24, 1918.

"2. The amount of this bond is hereby decreased from 50 to 33½ per cent of your total contract."

Under date October 28, 1918, Gen. Goethals wrote Mr. Spear in part as follows:

"I beg to inform you that it will not be possible under the conditions of your proposal and the existing law and regulations governing contracts to undertake any modifications of the terms of the proposal until you have completed action with reference to your contract; that is, the execution of the contract in accordance with the terms of the proposal and the filing of a suitable bond in connection therewith.

"It is understood that you are to advise this office on the 30th instant definitely whether you will be able to execute the contract for the work awarded you, and file in connection therewith a bond as called for in the terms of the award.

"Please acknowledge receipt of this communication at your earliest convenience."

Under date October 31, 1918, Gen. Goethals undertook to revoke the award for the construction of these vessels by letter addressed to claimant as follows:

"1. In connection with the award of your company of June 29, 1918, for the construction of 14 reinforced concrete river steamers in accordance with bids submitted by you under date of June 25, 1918, which award you were formally notified of by letter from this office dated July 1, 1918, you are hereby informed that the award for the construction of these vessels by the West Coast Shipbuilding Co. is hereby revoked.

"2. You are also informed that since you have not entered into contract for the construction of the above boats as agreed, the bond submitted with your bid is hereby declared forfeited.

"3. The provisions upon which the above actions were based are included in the circular proposal and specifications for the construction and complete equipment of 130-foot steel and reinforced concrete river steamers, which were furnished you, and are as follows: 'That if the proposals be accepted within sixty days from date of opening of bids, bidder will within ten days after notification of acceptance enter into formal contract and give bond with good and sufficient sureties for the faithful performance of the same.'"

This action on the part of Gen. Goethals met with very strong protest from Mr. Spear, president of claimant. He at no time accepted or acquiesced in any cancellation either of the award or of the formally executed contract, but, on the contrary, desired to proceed with the work and requested further time in which to arrange for and make the required bond, which request was denied.

DECISION.

1. It is deemed expedient to consider that portion of the claim based upon the formally executed contract, the Charleston contract, separate and apart from that portion arising under the act of March 2, 1919.

CLAIM UNDER G. O. 103, W. D., 1918.

2. It is to be observed that in the circular proposal and the award issued by the Government, a performance bond was required to be given by the successful bidder upon the contract being entered into. This requirement became a substantive part of the contract and was made so by the terms of the contract itself in the following language:

"That the parties do hereby mutually covenant and agree to and with each other, referring to any advertisement, circular to bidders, specifications, etc., hereto attached or referred to herein, or pertaining hereto, and which, so far as they are applicable, form a part of this contract * * *."

The failure of the claimant to make this bond constituted a breach of the contract, which would authorize the United States to terminate

the same by rescission or cancellation. It has been held by this Board, and it is a well-recognized legal principle, that one party to a contract, in the absence of fraud, accident, or mistake, may not rescind or cancel the contract without the consent or acquiescence of the other party. Mr. Black, in his work on "Rescissions and Cancellations," at page 21, states the proposition in this language:

"It is a general rule that a contract properly entered into by competent parties and founded upon a consideration, and which one of the parties is able and willing to perform, can not be rescinded by the other, unless he is able to show the existence of some well-recognized title to equitable relief, such as fraud, mistake, or duress. The homely proverb teaches that 'it takes two to make a bargain.' This is both good sense and good law. And the converse is equally good law that 'it takes two to undo a bargain, once properly made.'"

This rule, however, does not obtain where the one party has first breached the contract and the cancellation by the other is based upon that breach.

3. But it is earnestly insisted by counsel for claimant in a most able and elaborate brief that the United States waived the making of the performance bond by claimant and is now estopped from asserting the right of terminating the contract by cancellation due to any breach by claimant based upon a failure to make the bond. In the support of this contention, it is pointed out that the time when the Government was called upon to speak and demand the bond was when the contract was signed, August 6, 1918, as the proposal and award each stipulated that the bond should be given upon entering into the contract. It is urged that a waiver of the bond was effected by the Government urging and, in fact, directing claimant to proceed with the preparation of plans and specifications and construction immediately after being notified of the award and by the further acts and conduct of the Government officers as set forth in the findings of fact. It is argued with much force that the Government may not stand by and urge, or even permit, claimant to proceed in the performance of its obligations under the contract involving the expenditure of labor and money, knowing that a performance bond had not been given, and thereafter elect to cancel the contract for failure to give the bond, which failure, it is claimed, is due largely, if not entirely, to the controversy between the United States Shipping Board and the War Department as to the control of labor and materials, and the subsequent taking possession of and closing claimant's Everett plant by the Shipping Board, as testified to by Maj. Van Vleck. It is noted that while the contract was executed on August 6, 1918, the understanding is set forth therein that "construction of the vessels hereinabove mentioned was commenced on June 29, 1918."

4. After a careful consideration of the entire case, we are of the opinion, in view of the fact that the duty in the first instance devolved upon claimant to furnish a bond when the contract was executed, its failure to do so was such a breach as authorized the United States thereafter to terminate the contract by cancellation. The extension of the time for making the bond which was accorded claimant was for its accommodation and convenience. To hold otherwise would be permitting claimant to take advantage of its own default and thereby rob the United States of that protection in making partial payments in accordance with the terms of the contract as the work progressed, which it was contemplated would be afforded by the bond.

5. The contract now under consideration, designated as the Charleston contract, having been formally executed, and having been terminated by cancellation, the Secretary of War is without jurisdiction to undertake any adjustment of that portion of the claim based upon or arising under that part of the contract, and in this respect and to this extent the former decision of the Board of Contract Adjustment in this case is approved.

CLAIM UNDER ACT OF MARCH 2, 1919.

6. The conclusion reached in paragraph 5 of this decision does not obtain, however, in the case of the termination of an informal agreement. It developed on this hearing that the contract for the construction of seven of the boats at Everett, Wash., was never signed by any Government officer, although it appears to have been the understanding of all Government officers that the contract had been executed, claimant having signed it on or about August 9, 1918. In such circumstances, the notice of the award under date of July 1, 1918, for the construction of seven of the vessels at Everett, Wash., which was issued to and received by claimant, constituted an agreement within the terms of the act of March 2, 1919, and this Board has frequently so held. (Case of B. F. Moore & Co., No. 555, Vol. III, pt. 2, p. 154, these decisions; case of Henry Sonneborn Co., No. 333, Vol. III, pt. 2, p. 338, these decisions.)

7. While the original informal contract is not binding or conclusive upon the parties it is admissible in evidence as tending to shed light upon what were the nature, terms, and conditions of the agreement. (Case of Edward C. Budd Mfg. Co.—No. 2143, Vol. IV, pt. 2, p. 183, these decisions.)

The facts as developed by this record strongly appeal for the application of the "fair and equitable basis" rule for adjustment mentioned in the act of March 2, 1919, in so far as that portion of the claim based upon an informal agreement is concerned. The

Government having "revoked" the award of July 1, 1918, after claimant had made expenditures and incurred liabilities in the construction of the seven vessels at Everett, and it appearing that said agreement was for "purposes connected with the prosecution of the war" and for War Department purposes, this Board finds and holds that an implied agreement was raised up between claimant and the United States whereby the United States became obligated to reimburse claimant the actual expenditures necessarily made and liabilities necessarily incurred in and about the construction of the seven boats at Everett called for in the informal agreement up to 31st day of October, 1918, the date the Government "revoked" the award, and the claimant is therefore entitled to relief under the act of March 2, 1919, for that portion of its claim based upon and arising under that informal agreement.

8. We do not feel authorized to take any action on, or make any reference to, the claim of the Warcrete Shipbuilding Co., No. 342, as requested by claimant, for the reason that an appeal is now pending before the Secretary of War from the decision of the Board of Contract Adjustment in that case, and for the further reason that it does not appear that the Warcrete Co. has joined in such request. This decision will be without prejudice to the rights or status or future action of the Warcrete Co. in regard to its claim.

DISPOSITION.

The Appeal Section, War Department Claims Board, will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate Form C, together with a copy of this decision to the Purchase Section, War Department Claims Board, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Lieut. Col. McKeeby and Capt. Marcum concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

JANUARY 26, 1921

Case No. 2914.

In re CLAIM OF PLATT IRON WORKS.

1. **AMORTIZATION COST OF MACHINERY USED ON PREVIOUS CONTRACT NOT SUBJECT TO COST OF REINSTALLATION—ACCRUED REPAIRS—ADDITIONAL EQUIPMENT.**—Where a contract for machining shell is suspended when about one-third complete, the cost of machinery used on a previous contract can not be amortized, but the expense of reinstallation and of the necessary repairs and equipment to fit the machinery for use on the Government contract may be amortized where both the Government and claimant contemplated that such expense would be necessary.
2. **EQUIPMENT, CURRENT REPAIRS ON.**—The expense of normal current repairs due to use of machinery in machining shell under a contract which is afterwards suspended should be absorbed in the price received for the finished shell, and no allowance can be made therefor.
3. **MATERIALS—STORES, PERCENTAGE ON.**—In order to provide for shrinkage on materials taken from a contractor's storeroom for use on a contract for machining shell, a percentage determined from extended experience may be allowed as an item of cost of a suspended contract where, pursuant to the contractor's custom, such percentage is necessary to show the true cost of such materials.
4. **LABOR—BONUSES PAID TO WORKMEN.**—Where in order to avoid an increase in wages a contractor in good faith pays small bonuses to workmen, such bonuses may be allowed as a part of the labor cost in making an award under a suspended contract.
5. **OPERATING EXPENSES—OVERHEAD.**—Although the percentage of overhead to direct labor charged by a contractor whose contract is suspended may appear high, yet if the expense so charged was actually and in good faith incurred in connection with the contract, and there is no evidence of negligent mismanagement, the percentage charged should be allowed in an offer of award under a suspended contract.
6. **PLANT AND EQUIPMENT—EXCESS COST OF BUILDINGS.**—If, due to war conditions, the cost of a necessary special facility in the nature of a permanent addition to the contractor's plant is abnormally high, the Government should reimburse claimant for the unamortized portion of such excess cost upon suspension of the contract.
7. **EQUIPMENT—GAUGES—COST OF.**—Where the usual source of supply for gauges was exhausted, and a contractor makes necessary gauges in its shop and thereby incurs experimental expense not reflected on view of the gauges not consumed on suspension of the contract, it is more equitable to amortize the actual cost of all gauges prepared and necessary for the contract over the entire contract than to estimate the cost of the gauges on hand and allow the estimated cost of the unused ones and one-half the estimated cost of those used but not consumed.

8. **SPECIFICATIONS—CHANGE, EXPENSE INCIDENT TO.**—Where the contract provides for an increase in the price of shell if engineering changes increase the cost, and the cost of the shell is increased because of changes in the forgings specifications, on suspension of the contract the contractor is entitled to an allowance sufficient to cover such excess cost, including the cost of additional equipment.
9. **COSTS—PREMIUM ON BOND TO WAR CREDITS BOARD.**—The unamortized portion of the premium paid a surety company for a bond given the War Credits Board as security for a loan of funds with which to purchase materials is an element of cost incident to the contract, and on suspension of the contract the contractor should be relieved thereof, where the necessity for such loan was contemplated at the time the contract was executed.
10. **CLAIMS—COST OF PREPARING.**—Where on suspension of a contract and before the finance forms are available the contractor sets up his claim on a cost-plus basis and afterwards is required to set it up on finance forms the additional expense thus incurred is not an item of cost for which the contractor can be reimbursed.
11. **INTEREST ON GOVERNMENT LOAN.**—Interest paid and to be paid on a loan from the War Credits Board for the purchase of material for use in connection with the contract for the machining of shell is an element of cost, and on suspension of the contract the contractor should be relieved thereof, where the Ordnance Pamphlet entitled "Definition of Costs Pertaining to Contracts," dated June 27, 1917, is a part of the contract.
12. **MATERIALS—SPOILED AND UNACCOUNTED FOR FURNISHED BY THE GOVERNMENT.**—Where by reason of the suspension of a contract the contractor's opportunity to reclaim spoiled forgings is cut off, as is also his opportunity to recoup his loss on spoiled forgings in the early stages of the contract in excess of normal spoilage, the contractor is entitled to such an allowance on account of spoiled forgings as will reasonably compensate him for such excessive spoilage as he would have recouped had he been permitted to finish the contract.
13. **CLAIMS—METHOD OF STATING.**—Where a contractor whose contract is suspended includes in his claim an item for the cost of materials in process and a claim for excess cost of finished shell, and in an amended claim separates the excess cost into items caused by engineering changes and excess early cost, improperly including the cost of materials in process in the early excess cost, the error is immaterial, and if the item of early excess cost in the sum claimed is reasonable it is proper to include in an award to be offered on suspension of the contract an additional allowance for the cost of unworked direct materials.
14. **CLAIM AND DECISION.**—Claim for \$589,392.62 under the act of March 2, 1919, for damages on account of the suspension of a contract for the machining of 75-mm. shell. Held, claimant is entitled to recover in part.

Lieut. Col. Smith writing the opinion of the Board.

FINDINGS OF FACT AND DECISION.

1. This case arises under the act of March 2, 1919. Statement of claim has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$785,989.44, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The claim was heard and reheard by the Cincinnati ordnance district claims board, and also several hearings were had before the Ordnance Claims Board, and some consideration was given the matter by the War Claims Board. The Cincinnati ordnance district claims board at one time offered claimant a gross award of \$478,937.88, net \$294,245.73, which claimant accepted. The Ordnance Claims Board, however, refused to confirm this award. About April 8, 1920, the Ordnance Claims Board offered claimant a net award of \$142,366.08, which claimant refused, and appealed to the Appeal Section, War Department Claims Board. In transmitting the record to the Appeal Section, the War Department Claims Board directed the Appeal Section to hear the claim fully and to determine the amount, if any, due claimant.

A five-day hearing was held at Dayton, Ohio, and eight days were consumed in an adjourned hearing at Washington, including the time allowed for conferences between the Ordnance officers and accountants of the Government and accountants and engineers of claimant, looking to the shortening of the time to be consumed in the actual hearing by the elimination of extraneous matter, and expressions of opinion one to the other as to the items involved, so that the committee which conducted the hearing might have the matter before it in more concrete form. Every opportunity has been afforded claimant to fully present its claim. The record consists of 1,206 pages. Many of the exhibits, covering some 232 pages, have been copied in the record, and many more were introduced and identified, the character or extent of which made their reproduction so expensive that it was deemed unwise to have them copied in the record.

3. On October 19, 1917, the Purchase Section, Gun Division, Office of the Chief of Ordnance, through Maj. C. F. Cooke, Ordnance, requested of claimant a bid for machining 1,000,000 75-mm. common steel shell, the Government to furnish the forgings, copper bands and base covers f. o. b. claimant's plant, claimant to machine and band the forgings, attach covers and cover the shell with anti-rust compound and procure suitable shipping boxes.

4. Mr. E. C. Wells, claimant's vice president and general manager, prepared an estimate upon which to base such a proposal. This estimate shows a total cost of \$1.517 per shell (Cl. Ex. 17, R. 1304). October 30, 1917, Mr. Wells wrote the Purchase Section, as follows:

"Complying with your favor of October 19th, 1917 (G. P. W. O. 209-504-G), we shall be pleased to machine and deliver one million (1,000,000) 75-mm. common steel shells f. o. b. cars our works at Dayton, Ohio, for the sum of two dollars twenty-two and one-half cents (\$2.22½) per shell.

"In arriving at the above price we have considered the great uncertainty in connection with labor conditions, and the possibility that there may be delays and interruptions in operation due to the

fact that the Government may at any time make changes to meet new experience in the war or to meet new requirements of the Army.

"We figure no depreciation on buildings or permanent plant, but amortize all new expenditures for equipment for this contract and the second-hand value of special shell-making equipment and machinery. The title to anything amortized would be transferred to the Government upon completion of the contract.

"If the Government will assume the uncertainties above mentioned we will undertake the order at a profit of thirty (30) cents (includes taxes) per shell and an amortization charge of thirty (30) cents per shell.

"In order that we may undertake this work it will be necessary for the Government to advance as much of three hundred thousand dollars (\$300,000) as we may require to meet the expense of preparation and for initial expenditures before payments are made under this contract. The large volume of business which our company is now doing has absorbed our working capital.

"Contingent upon the prompt delivery of the components to us by the Government and subject to unforeseen delays we can make the following deliveries:

	Shell.
January-----	25,000
February-----	100,000
March-----	125,000
April-----	150,000
May-----	150,000
June-----	150,000
July-----	150,000
August-----	150,000
	<hr/> 1,000,000

"This proposal is based on the assumption that all forgings will be properly annealed and free from cinder." (R. 1219.)

5. On November 13, 1917, Procurement Order, War Ord. 892-497A was issued by the Gun Section, Office Chief of Ordnance, over the signature of Col. Jay L. Hoffer, Ordnance, the order being as follows:

"WAR DEPARTMENT, GUN SECTION,
"OFFICE OF THE CHIEF OF ORDNANCE,
"Washington, D. C., November 13, 1917.

"PROCUREMENT ORDER, War-Ord. 892-497A.

"Summary.
"Firm: Platt Iron Works, Dayton, Ohio, 800,000.
"Order for: Machining 800,000 75-mm. common steel shell, \$2.15 each; total, \$1,720,000.
"GENTLEMEN: 1. Under the provisions of section 120 of the act of Congress relating to national defense, approved June 3, 1916, an extract copy of which is enclosed, and other laws of the United States and the Executive orders of the President of the United State, or heads of its departments under which the requirements of advertisement for proposals are dispensed with; also in accordance with invitation to bid to you dated October 19, 1917 (GP

471.12/867) and your proposal of October 30, 1917 (GP 471.12/854), I am instructed by the Chief of Ordnance to hereby give you an order for machining eight hundred thousand (800,000) 75-mm. common steel shell.

"2. The United States will supply, without cost to you, all the necessary forgings, copper bands, and base covers. You will machine and band the forgings, attach the base covers, supply wooden shipping plugs, cover the shell with an antirust compound, and furnish suitable shipping boxes, or make such other shipping provisions as will assure the shell arriving at the loading plant in as good condition as when accepted by the United States at your machining plant.

"3. These shell are to be machined in accordance with Ordnance Office "Specifications for Common Steel Shell" governing machining, heat treatment and test, dated September 21, 1917, revised October 18, 1917; also in accordance with Ordnance Office drawing 75-2-164, last revised September 27, 1917. A copy of the above specifications and a brown print of the drawing are enclosed herewith.

"4. The inspection of this machine work is to be conducted by Inspection Section, Gun Division, Albemarle Building, 24th Street and Broadway, New York, N. Y.

"5. You will be paid two dollars and fifteen cents (\$2.15) for each machined shell f. o. b. your plant.

"6. Delivery of the shell covered by this order, f. o. b. your plant, is to be made as follows:

	Shell.
January, 1918.....	25, 000
February, 1918.....	100, 000
March, 1918.....	125, 000
April, 1918.....	150, 000
May, 1918.....	150, 000
June, 1918.....	150, 000
July, 1918.....	100, 000

"7. The machine work covered by the foregoing order should be charged to the Chief of Ordnance, U. S. Army. You are requested to forward to this office triplicate copies of invoices.

"8. Any communication in connection with this procurement order should make reference to G. P. W. O. 209-504G, War-Ord-G892-497A, GPP. You are requested to notify this office of your acceptance of the above order by wire as well as by the enclosed copy." (R. 1221.)

It will be noted that the number of shell ordered was 800,000 and not 1,000,000 as proposed, and that the price was reduced from the proposed price of \$2.22½ to \$2.15 per shell.

6. Claimant accepted the order by telegram dated November 23, 1917.

7. By letter from the Purchase Section, dated November 26, 1917, claimant was advised to suspend buying or manufacturing tools and fixtures pending change from high explosive to gas shell. Receipt of notice of the proposed change was acknowledged by claimant in its letter dated December 4, 1917, in which claimant stated:

"We should also like a complete forging specification and a statement of the analysis of the steel to be used so that we may get some idea of the quality and thus be able to determine feeds and speeds. This is essential in rearranging our plant." (R. 1230.)

Thereafter Mr. Wells conferred with Ordnance officers in Washington relative to the proposed changes, and received from Lieut. Knable, Ordnance, a copy of the specifications for the forgings which claimant would be required to machine. (Cl. Ex. 15, R. 134, p. 1280.) So far as believed material here, these specifications provide:

"(a) All forgings must be allowed to cool slowly from the forging heat. The arrangements for cooling shall be satisfactory to the inspector."

Drawings were attached to and are a part of Exhibit 15. These drawings were dated September 11, 1917. The thickness of the base as shown thereby was 0.94 inch, plus or minus 0.05 inch. The wall thickness was fixed at 0.51 inch, with tolerances of 0.103 inch (R. 946). The diameter of the boss was 1.5 inches. The extrusion of the boss was fixed at minus 0.5 inch. The specifications for the forgings were changed from time to time. As the result of the last modification of these specifications, dated February 16, 1918, the thickness of the base was fixed at 1.1 inches, plus or minus 0.05 inch, the minimum wall thickness at 0.383 inch, and the maximum eccentricity at 0.35 inch (R. 949—956). The figures showing the dimensions of the boss remained the same; however, they were qualified by the word "approximately," which allowed of greater tolerances than as originally specified (R. 960). The maximum outside diameter was not changed, but remained 3.35 inches plus 0.05 inch.

8. By letter dated December 13, 1917, a conversation between Mr. Wells and Capt. Garrett, of December 12, relative to the change in the character of the shell, was confirmed by the Purchase Section, and claimant was notified "to proceed with all possible production of gas shell." The letter also stated that appropriate changes would later be made in the contract, but for claimant to "consider this as sufficient to go ahead."

9. On December 14, 1917, claimant received for approval from the Purchase Section a part of the contract covering War Ord. G892-497A for machining 800,000 75-mm. shell.

10. On December 15, the original procurement order was amended to read "Mark II" shell and the specifications applicable were changed from those dated September 21, 1917, revised October 18, 1917, to those approved November 26, 1917, and the office drawings applicable were changed from drawing 75-2-164, last revised September 27, 1917, to Ordnance Office Drawing 75-2171, last revised

November 14, 1917. The order also recites that a copy of the specifications and a brown print will be sent claimant later. (Cl. Ex. 11, R. 1233.) These were forwarded December 18, 1917, and are part of claimant's Exhibit 11.

11. A contract (Cl. Ex. 13, R. 1244) was executed, dated December 31, 1917, though not actually signed until about January 29, 1918. It is signed on behalf of the Government by "Jay E. Hoffer, colonel, Ordnance Department, U. S. Army, contracting officer, by Chas. N. Black, Lieut. Col., Ord. Dept., N. A."

The portions of the contract material to this controversy are as follows:

"ARTICLE I. The contractor agrees to machine and band 800,000 75-mm. common steel shell, Mark II, cover the shell with an antirust compound, furnish suitable wooden shipping plugs, and to deliver the completed shells to the United States, all in accordance with the drawings and specifications referred to in schedule 1 hereto attached and made a part hereof, and such changes as may be made therein as hereinafter provided. The United States agrees to furnish to the contractor component parts and materials as hereinafter provided, and to pay for the completed shells all upon the terms and conditions in this contract set forth.

"ARTICLE II. The contractor agrees to deliver the completed shells to the United States f. o. b. cars at the plant of the contractor, at Dayton, Ohio, according to the following schedule:

	Shell.
During the month of January, 1918-----	25, 000
During the month of February, 1918-----	100, 000
During the month of March, 1918-----	125, 000
During the month of April, 1918-----	150, 000
During the month of May, 1918-----	150, 000
During the month of June, 1918-----	150, 000
During the month of July, 1918-----	100, 000
	(R. 1246.)

"The United States agrees to furnish, without cost to the contractor, the necessary shell forgings, rough copper rotating bands, and shipping boxes for the shells at the plant of the contractor, and whenever the contractor may call for delivery of the same. Such components shall remain the property of the United States, and the contractor agrees to use due and proper care in the handling and storing thereof while in its possession. All scrap resulting from the manufacture of the shells herein contracted for shall belong to the contractor. It is agreed that the material furnished by the United States shall be in accordance with the requirements under the specifications. (R. 1251.)

"ARTICLE V. It is agreed that the contracting officer may, by written notice to the contractor at any time, make changes in the drawings and specifications or supplemental or substituted drawings and specifications which relate to, form a part of, or are added to this contract, or in the provisions whereby the United States undertakes to furnish

materials. If such changes involve substantially additional expense, a fair addition will be made to the purchase price, but if such changes involve substantially less of such work or labor and material, a fair deduction may be made therefrom, all as shall be determined by the contracting officer. No claim for addition or deduction on account of any such change will be made or allowed unless the same has been ordered in writing. (R. 1253.)

* * * * *

"ARTICLE IX. * * * It is therefore stipulated and agreed that at any time, * * * the contracting officer may notify the contractor that such part or parts of the shells herein contracted for then remaining to be delivered, as the contracting officer may designate, shall not be made or further proceeded with, and the contractor shall thereupon cease making or proceeding with the material so designated. The contractor shall, however, complete the manufacture of shells then actually in process and also such parts herein contracted for as are not included in the notice. Such notice will only be given in accordance with the spirit of this article.

"In the event of the cancellation of this contract as in this article provided, the United States will inspect the completed shells then on hand and the shells then in the process of manufacture when completed, and will pay to the contractor the price herein agreed upon for each and every unit accepted by and delivered to the United States. The United States will also pay to the contractor the cost of the component parts and materials purchased with the approval of the department, then on hand in an amount not exceeding the requirements for the completion of this contract, which shall be in accordance with the specifications referred to in "Schedule 1," hereto attached, and also all costs theretofore expended and for which payment has not been previously made, and all obligations incurred solely for the performance of this contract of which the contractor can not be otherwise relieved, together with a sum equivalent to ten (10) per cent of all such costs so expended, except that said ten (10) per cent shall not apply on the cost of purchased component materials or parts not in process of conversion or assembly. The ten (10) per cent of cost herein allowed shall be subject to such addition as the contracting officer may deem necessary to fairly and justly compensate the contractor for work, labor, and service rendered under the contract.

"Title to all component material and parts paid for by the United States under this article shall, immediately upon such payment, vest in the United States.

"The decision of the contracting officer as to payments and allowances to the contractor under this article, made in accordance with the terms of this contract and with "Schedule 2," made a part hereof, will be final. (R. 1259, 1260, 1261, 1262.)

* * * * *

"ARTICLE XVI. The decision of the contracting officer on all questions of prices, and the allowance and the payment thereof shall be final, except that either upon the completion of the contract by the contractor, or its termination by the United States, the contractor may appeal to the Chief of Ordnance by filing one statement of

claim (in sextuplicate), which shall embrace all claims previously disallowed or determined adversely, provided all such claims shall be certified by the contracting officer or his duly authorized representative as being in their entirety the subject of expenditure of or cost to the contractor. The decision of the Chief of Ordnance shall be final on such an appeal.

"Except as this contract shall otherwise provide, any doubts or disputes which may arise as to the meaning of anything in this contract shall be referred to the Chief of Ordnance for determination. If, however, the contractor shall feel aggrieved at any decision of the Chief of Ordnance upon such reference, it shall have the right to submit the same to the Secretary of War, whose decision shall be final. (R. 1267.)

* * * * *

"ARTICLE XIX. The contractor shall furnish to the United States within 10 days after the execution and delivery of this agreement a bond in the sum of \$172,000, conditioned upon the full and faithful performance by the contractor of all terms, covenants, and conditions of this agreement on the part of the contractor to be performed. Such bond shall be in the form and with sureties satisfactory to the contracting officer. Unless such bond is furnished within the time limited, this agreement may, at the option of the contracting officer, be canceled." (R. 1268, 1269.)

The contract fixes the price for machining each shell at \$2.15 and provides that the forgings spoiled by the contractor shall be charged to it.

Schedules 1 and 2 attached to the contract are by reference made a part of it. Schedule 1 provides:

"Each and every of the pamphlets, drawings, specifications, and other papers below enumerated is made a part of this schedule and of the contract of which this schedule is a part.

"'Specifications for Common Steel Shell,' revised October 18, 1917.

"Ordnance Office drawing class 75, division 2, drawing 171, last revised December 26, 1917." (R. 1270.)

Schedule 2 is in part as follows:

"The term 'cost,' as applied to this contract, consists of four elements, which are concretely defined in the following:

"(1) The cost of all direct labor paid for by the contractor and used in the production of the articles contracted for herein.

"(2) The cost of all direct materials contained in or forming part of the articles contracted for herein.

"(3) Pro rata share of factory overhead expense applicable to and necessary in connection with the manufacture of the articles contracted for herein.

"(4) Pro rata share of administrative and general expense applicable to and necessary in connection with the manufacture of the articles contracted for herein.

"The foregoing paragraphs Nos. 1, 2, 3, and 4 are subject to further amplification as contained in the 'Definition of cost pertaining to con-

tracts' to be supplied by the Finance Division (Accounting Section) of the Ordnance Department. As conditions arise necessitating changes or modifications in the definitions referred to, the contracting officer will furnish the contractor with information in regard thereto." (R. 1270, 1271.)

Schedule 2 also contains specifications for common steel shell, which are in part as follows:

"1. *Material*.—The common steel shell will be machined and finished from forgings supplied by the Government as manufactured under current specifications for such material.

"2. *Inspection of forgings*.—Upon receipt of the forgings the manufacturer will make inspection for defective forgings. Should any be found defective at this time or at any stage of the manufacturing they will be referred to the inspector, who will decide whether or not the manufacture will be continued or whether such forgings will be laid aside to determine the responsibility for their defective condition.

"3. *Heat treatment*.—In order to insure satisfactory control of the temperature, furnaces used in heat treatment of shell will be equipped with pyrometers satisfactory to the inspector. The hardening of the shell in the heat-treatment process will be accomplished by using a spray applied simultaneously to the inside and outside of the projectile. The arrangements for hardening and for the subsequent drawing of the shell must be satisfactory to the inspector as insuring uniformity of product. In no case will a bath of molten lead be used in connection with the heat treatment.

* * * * *

"4. *Hardness test*.—After completion of heat treatment each shell will be tested for hardness by the Brinell ball-test method. The diameter of the ball to be used is 10 millimeters. The test will be made on the body of the shell about $\frac{1}{2}$ inch below the bourrelet. With a test pressure of 6,600 pounds on the Brinell ball the diameter of indentation should fall between the limits of 3.4 mm. and 3.8 mm. Until the limits shall have become well established as the result of further experience small variations beyond these limits may be authorized by the inspector, provided the shell meet the hydraulic test and are otherwise entirely acceptable.

* * * * *

"6. *Rejected shell*.—The machining contractor will reimburse the Government for the value of the forgings represented by shell rejected due to defects in heat treatment or machining operations for which he is responsible. The machining contractor will be reimbursed by the Government for the cost of work done on shell which are rejected due to defective material furnished by the Government, provided the requirements of Paragraph II have been satisfactorily complied with.

* * * * *

"11. *Gauges*.—The manufacturer will provide all the gauges needed for the manufacture and inspection work except that the Government will in general provide the inspectors with a set of the inspection gauges and the corresponding set of master gauges covering the important dimensions to be gauged. These will be available

for reference purposes, but can not be habitually used for inspection purposes. A satisfactory system of gauge inspection and checking must be maintained by the manufacturer." (R. 1271, 1272, 1273, 1274, 1276.)

12. Upon receipt of the procurement order dated November 13, 1917, and pursuant to verbal instructions from ordnance officers, claimant began preparations for the performance of the contract.

13. Claimant is a corporation of many years standing, maintaining an extensive plant at Dayton, Ohio. Its principal prewar business was the manufacture of pumps. It had, however, prior to the time it received the purchase order to machine the shell in question, completed a contract with the Canadian Car & Foundry Co. for the machining of 3.3-inch Russian shell, this contract having been completed about March, 1917 (R. 31). In March, 1917, claimant had also completed a subcontract for the Bethlehem Steel Co. for machining 1,500,000 shrapnel shell for the Russian Government (R. 31). New machinery was installed for the Bethlehem Steel contract (R. 32).

14. At the time it entered into the Government contract, claimant was engaged in departments of its plant, other than the shell shop, in work upon two contracts with the Navy, one for machining 6-pounder shell, caliber .24 (R. 197), the other for torpedo air compressors, and claimant was also working upon a tank contract with the Ordnance Department (R. 143).

15. The machinery which had been used on the Russian contract was the machinery which claimant contemplated using and did use in the performance of the contract out of which this controversy arises. This machinery had been largely removed from the shell shop prior to the time this contract was taken and its sale was contemplated; in fact, about one-third of such machinery had already been sold, and a large part was in storage (R. 37).

In order to prepare for work on this contract, it was necessary to reinstall such machinery as would be required, readjust the machinery then in place in the shell shop, repair some of the Russian machinery, attach additional equipment to much of it, and purchase some new machinery.

16. Claimant's plant was ready to begin operations early in January, 1918 (R. 80), and claimant then called for a carload of forgings (R. 80). The Government furnished no forgings until about January 25, 1918, when claimant only received 35. On February 1, 1918, 15 more were delivered. No more were received until March 22, and prior to April 1, 1918, but 6,308 forgings had been delivered (Cl. Ex. 20, R. 1304). Much complaint was made by claimant during the progress of the work on account of the delay of the Government in furnishing forgings, and it is quite possible that this delay was of inconvenience and expense to claimant.

17. On December 17, 1918, a second supplemental contract (Cl. Ex. 16, R. 1300) was formally executed by the Government, but not signed by claimant (R. 25), reciting that an extension of time for deliveries was made necessary "by the failure of the United States to deliver the forgings to the contractor in sufficient time for the contractor to make delivery of the shell in accordance with the schedule of deliveries provided for in said original contract." The supplemental contract also provided for the release by claimant of any and all claims and demands due to the Government's delay in furnishing the forgings. Claimant makes no claim for damages on account of the Government's delay in furnishing forgings (claimant's memorandum brief 24 to 28, inclusive). It contends, however, that the second supplemental contract amounts to an admission on the part of the Government that it failed to furnish the forgings in the quantities and at the times that they should have been furnished (R. 28—Cl. Brief 6). Claimant used the shipments of January 25 and February 1, 1918, for experimental purposes. About April 1, 1918, it began to machine the forgings then on hand. By April 15, 1,035 forgings had passed the fifth operation and 721 had passed the second operation (R. 169).

18. Prior to July 1, 1918, when vice president and general manager, Mr. Wells, left on a vacation, on account of ill health, claimant experienced no particular difficulty in machining the shells, except such as was due to the fact that "the lugs left on the base for centering" were too long and too large in diameter and that the bases were too thick, in regard to which complaint was made by claimant on April 29, 1918. (Cl. Ex. #1-B, R. 188, 1351.)

19. A first supplemental contract, formally executed, was entered into May 7, 1918, the sole purpose of which was to provide that the packing boxes should be furnished by the Government instead of claimant, and on this account the price for each shell was reduced from \$2.15, as provided in the original contract, to \$2.14334.

20. When Mr. Wells left the plant in July, the management thereof fell to Mr. J. F. Hartlieb, one of claimant's vice presidents, who had been connected with the management of the plant for some nine years. Mr. Hartlieb continued in charge of the plant until about the latter part of August, 1918, when Mr. Harold V. Coes, an experienced engineer connected with the engineering firm of Ford, Bacon & Davis, became general manager of the plant, and so continued until after the work was suspended (R. 207). Mr. Coes, however, had been at the plant since the latter part of June, originally having been sent there to make a survey of the plant and make recommendations as to improvements in the handling of its contracts and, generally, as to the plant conditions.

21. Mr. Coes testified that much difficulty was experienced in machining the forgings because of their eccentricity, their crooked powder pockets, and their hardness (R. 210, 211). He complained to Capt. F. H. Blakeslee, the ordnance inspector at the plant (R. 213), and in the early part of September told Capt. Blakeslee that if the character of the forgings did not improve that claimant would be compelled to refuse to machine them (R. 217).

Mr. Coes also testified that the elements of hardness and eccentricity present at the same time in a shell rendered it "impossible to take a single roughing cut without either breakage of the tool or forcing the shell out of the lathe or turning a thin wall shell" (R. 218); that without reorganizing the plant it was impossible to adjust the machinery which had been adjusted to one roughing cut, so as to make two roughing cuts, which were deemed advisable (R. 219); that the effect of undertaking to machine the character of forgings furnished by the Government was excessive wear and breakage on tools and machinery, and demoralization of labor, resulting in a high "turnover" of labor, retarded production, and consequent increased cost (R. 224).

Continual complaints to the inspector and Ordnance officers did not result in the Government furnishing more satisfactory forgings, and Mr. Coes, under pressure of ordnance officers to produce shells, determined to reorganize the equipment and methods so as to machine the character of forgings the Government was furnishing. This reorganization contemplated making two roughing cuts in lieu of one, and the segregation of the shells so as to put the hardest and most eccentric through heavier machines (R. 231). For the purpose of effecting this reorganization, the plant was practically shut down from the middle of October to the middle of November. However, during practically all of this time some of the operations were being carried on, but there was no continuous flow of forgings from the first to the last operation (R. 233).

During the time Mr. Coes was in charge, forgings were being furnished from several forging plants, including that of the Dayton, Ohio, Production Co. located in the vicinity of claimant's plant. Mr. Coes inspected this plant and observed the process of manufacture. He testified that the forgings were not permitted to cool slowly as required in the forgings specifications (R. 215); that claimant could have satisfactorily machined forgings complying with the specifications contained in Exhibit 15, without readjustment of its plant (R. 238), and that notwithstanding the hard and eccentric forgings, claimant could have overcome the delay in the production schedule and delivered 6,000 shell per day and completed the deliveries within the extended time (R. 239).

Before the reorganization 29 operations were required. After the reorganization the number of operations was increased to 40 (R. 265). The maximum daily production was 5,400 (R. 261). Additional tool equipment was necessitated on account of the reorganization (R. 264).

Mr. Coes also testified that the forgings received were divided into four classes, as follows:

- (a) Those which were hard and eccentric.
- (b) Those which were eccentric and soft.
- (c) Those which were extremely hard and eccentric.
- (d) Those which were concentric and of a reasonable softness.

Claimant proceeded to machine all except those of class (c) with its regular equipment, and the forgings of class (c) it undertook to machine with larger lathes which were taken from the main machine shop and set up for that purpose (R. 271). There were times when claimant did not have forgings, which necessitated the closing down of certain operations (R. 276,277); 370,548 forgings were received by claimant (R. 280), and it delivered 246,841 finished shells; of the difference of 123,707 forgings, 41,421 are accounted for by being in process; the balance, 82,286, are not accounted for except as spoiled forgings (R. 280), and raw material (R. 282).

22. Mr. E. C. Wells, a mechanical engineer of experience, vice president of claimant's plant, had complete charge of the work under this contract as general manager up to about July 10, 1918. He testified that the shell shop in which the Government contract was being performed had been specially constructed for work on the Bethlehem steel contract (R. 42); that claimant retained sufficient machinery to machine 6,000 shells per day had it received forgings which were machinable on the machines, as were the Russian forgings, and that claimant also purchased some additional special equipment (R. 48).

Mr. Wells also testified that in the estimated price contained in the proposal be included an estimate for the amortization or depreciation of the machinery which had been used on the so-called Russian contract (hereinafter referred to as the Russian machinery), which includes all of the machinery used on the Government contract, except such as was specially provided for it (R. 53-48). For the purpose of carrying out the Government contract, claimant erected an addition to the shell shop (R. 59), and asks reimbursement for the excess cost of this building (R. 58).

Mr. Wells explained that the price of \$2.15 per shell fixed in the contract was arrived at at a conference between Mr. Hartlieb and himself with the Ordnance officials in Washington between October 30, 1917, the date of claimant's proposal, and November 13, 1917, the date of the purchase order (R. 29); that the paragraph in his

letter of October 30, 1917, with reference to the amortization of the second-hand value of the special shell-making equipment and machinery (Russian machinery), was not modified (R. 60); that based on 1,000,000 shells, he estimated this amortization cost at 20 cents per shell, and that the reduction in the number of shells from 1,000,000 to 800,000 would raise the depreciation twenty (20) per cent (R. 61, 62).

23. The production sheets show that in the beginning the cost per shell was \$3.00 (R. 63). The lowest cost per shell reached by claimant was \$1.98 (R. 63).

24. Mr. Wells produced a memorandum made by him shortly after a conference in Washington on November 9, 1917, with Maj. Gordon Grand and Lieut. Knable, when claimant's representatives were advised that the contract would be based on the specifications furnished claimant at that time for common steel shell, approved September 21, as amended November 6, 1917, amendment No. 1 (R. 66).

Mr. Wells further testified that upon receipt of the procurement order claimant laid out its plan of operation based upon experience under the Russian contracts, rearranged the machinery and installed that which had been removed; designed fixtures, cutting tools, gauges, and the necessary additional equipment; placed orders for additional machinery, such as machine tools and testing apparatus (R. 76), and as fast as the drawings of these were ready issued order for the manufacture of equipment, boring bars and cutting tools, gauges, etc. Some of these things were ordered outside the plant and others ordered manufactured in claimant's plant upon executive orders, hereinafter referred to as X-orders. By an X-order is meant one issued by the officer in charge of the plant and sent to the department in which the work is to be done. These orders, with the costs attached, became a part of the records of the company. No general overhead or administrative expense was charged against the X-orders (R. 77, 78). All preparations for the manufacture of the shell were made under X-orders, except such items as supplies purchased outside the plant. X-orders were also issued for the purchase of all equipment and its installation (R. 79).

He also testified that it was difficult to obtain skilled labor and that he built up an organization by using a skeleton organization composed of men who had had previous experience in their plant (R. 80).

25. No master gauges were furnished by the Government, although requests therefor were numerous (R. 83), as the Government was unable to procure them. Claimant endeavored to purchase them from the usual source of supply, but could not because of the inability of manufacturers to meet the demand, and eventually claimant was compelled to make its own gauges. The Government promised

from time to time to furnish the gauges (R. 101). Claimant was unable to get satisfactory information from which to manufacture the gauges until the latter part of June (R. 105). Efforts to obtain the gauges were begun in January, 1918 (R. 106).

26. He further testified that if the forgings had been manufactured in accordance with the specifications and slow cooled, such slow cooling would have amounted to annealing, and the shells would have been of a hardness which claimant could have machined satisfactorily (R. 121). At first claimant understood that it would not be necessary to "heat treat" the shell, but afterwards claimant was requested to, and did install the necessary heat-treating equipment (R. 121).

Mr. Wells testified that the chemical specifications for the forgings were very similar to the Russian specifications, and that if the forgings had been slow cooled as required by the forgings specifications they would have been of a degree of hardness similar to the Russian forgings which claimant had satisfactorily machined (R. 129, 436, 437, 438).

27. Mr. Ross Biddle, who had been connected with the plant for more than 18 years, and who was in charge of tool supplies and repairs and of the tool-making department, testified that he was acquainted with about every machine in the shop from two angles—tooling and repairing; that the shop was equipped to carry 125,000 75-mm. shells through the boring and rough-turning operations during the month of March, 1918 (R. 289); that a great deal of difficulty was experienced in keeping sufficient rough-turning tools on hand; that constant repairs to, and regrinding of, the rough-turning tools and end-facing tools was necessary, and also constant repairs to the machinery; that prior to July claimant received some hard and eccentric forgings, but not many; that thereafter, however, the forgings were generally exceedingly hard and eccentric; that—

"The eccentricity of the shell would throw an extremely heavy cut on one side and an extremely large duty on the tool at one point, and when the cut would not true the full diameter the break of the cut would allow the spring to be taken up in the—or allow the spring to relax in the machine, and then when it started on the heavy cut again, putting a strain on it, the strain would be so great as to split the aprons, break the teeth out of the racks and pinions, and break the centers supporting the shell, break the driving jaws that would drive the shell, and break the tool. Working on the eccentric shell, when the tool would encounter that scale, it would take a keen edge from it, and in about one or two revolutions it became very dull, and it either broke the tool, broke the center, or broke the machine, and it was so quick the operator could not stop it. * * * The rack, pinion, and the apron were the three principal parts of the machine to be broken." (R. 291, 292.)

He also testified that it took 50 per cent more men to take care of the repairs under this contract on account of the conditions described than it otherwise would have taken; that an average number of 140 men were engaged in tool repair work under the Government contract, and an average number of about 75 men were engaged in similar work under the Russian contract; that in preparing for work under the Government contract the machines used on the Russian were overhauled, new parts were put on them, new aprons, racks, and pinions, and that after these repairs and additions the machines were almost in the same condition as new machines, and in such condition when claimant began to use them upon the Government contract (R. 300). The other work that was being carried on in the plant, including the machining of the 6-pound shells for the Navy, was being done in another portion of the plant and with other machinery (R. 309).

28. J. F. Hartlieb, vice president of claimant company, testified that on December 5, 1918, he was verbally notified by Mr. Bippus and Mr. Baker of the Dayton ordnance office to suspend work on the contract (R. 311); that he told them that the only condition under which claimant would suspend operations would be that it be reimbursed "for all out-of-pocket expenses incurred up to that date." Mr. Hartlieb was asked by them when claimant would suspend, and stated that, of course, claimant could suspend immediately, but preferred to suspend at the end of a pay-roll period, and that it was agreed claimant would suspend on December 10, 1918. Mr. Bippus promised to send a letter of confirmation. Claimant suspended operations on December 14, the contract then lacking about 69.145 per cent of completion. About December 21 claimant received a written notice of suspension from Washington, dated December 11, 1918. (Cl. Ex. 22, R. 1308.) Claimant's written acceptance of the written notice of suspension is dated December 20 (R. 314).

Mr. Hartlieb testified that from time to time he called the attention of representatives of the Government to the unsatisfactory character of the forgings and to the fact that an insufficient number of forgings were being furnished (R. 315), and that he made every reasonable effort to obtain forgings in larger quantities. In August or September, 1917, he had a conference with Lieut. Cheston and Maj. Franklin, in which he told them about the Russian machinery and that claimant was disposing of it, and that Maj. Franklin suggested that claimant retain it for machining shell for the Government.

29. In a letter from Maj. Franklin to the Cincinnati district claims board, Maj. Franklin stated:

"The writer further advised them (claimant) to hold on to all the machinery which they had, which could be used as complete

units for the machining of shell, because there were still large orders unplaced, and it was held that any concern who had the capacity for machining shells should operate this capacity to the maximum." (R. 1311.)

30. A letter from former Maj. F. C. Cheston, ordnance, to the Assistant Chief of Ordnance Cincinnati district claims board, dated April 11, 1919 (Cl. Ex. 24, R. 1312), reads in part as follows:

"It is understood by the writer that you desire as near official confirmation as possible; that the Ordnance Department knew of the equipment in the Platt Iron Works; that they expected to use said equipment if the requirement necessitated; and that the Platt Iron works were told not to dismantle their plant but to hold the same in case it was necessary to use it after the appropriation bill asked for was passed by Congress. These are the facts in the case and there are numerous reports and statements on file in the Ordnance Department which would give additional strength to this statement if you care to issue instructions to have them searched for, which are particularly: Memorandum prepared for Gen. Crozier somewhere about the 20th of June, 1917, and an official letter written him under the signature of Maj. Charles F. Cook, on or about October 6. The writer will further add that he had several conversations with Mr. Hartlieb in July and August of 1917 regarding the manufacture of 75-mm. shell, and while the writer's recollection is not absolutely distinct as to what was stated in those conversations, he knows it was either expressly stated or implied that we would not only require their facilities for the manufacture of this type of ammunition but all other existing facilities of which the department had a list that had been used for the manufacture of British 3.3-inch English and 3-inch Russian shells." (R. 1313, 1314.)

31. Mr. Hartlieb also testified that the machinery was retained by claimant for performance of this contract upon the statements of Majs. Franklin and Cheston (R. 340). He also stated that after the conversations and after a conference among the officers of the Platt Iron Works no further effort was made to sell such machinery as would be required upon this contract, but that thereafter the efforts of the company to sell Russian machinery was confined to such as would not be suitable or as would not be required for use in performing the Government contract (R. 341).

32. I. O. Cunningham, a practical valuation engineer, in the employ of Ford, Bacon & Davis, testified that he first became connected with the Platt Iron Works about November 4, 1918; that he made an inspection and survey of the machinery and estimated its value; that in making an estimate of the value of the Russian machinery he took the original inventories as to the costs of the various machines; that, based on 1914 prices, the machinery had a secondhand value of \$297,286; and based on November, 1918, prices it had a secondhand value of \$397,941 (R. 353, 354); that normal depreciation on machinery, such as was used in the shell shop, was about 10 per cent per annum (R. 347).

33. Richard Stressau, a graduate engineer of experience, connected with the firm of Ford, Bacon & Davis, testified that he was detailed to the Platt Iron Works plant about November 2, 1918; that at that time claimant was having trouble with thin wall shell, due to eccentricity and hardness of the forgings; that he introduced two new operations (R. 357, 358, 359); that notwithstanding the high cost of production up to the time of suspension, the contract could have been completed at a profit (R. 374, 425). He identified Exhibit 29 (R. 416) as a graphic chart made by him while at the plant from information acquired there. This chart shows that on May 28 the cost of production per shell was about \$3; that this cost decreased rapidly until about June 25, when the unit cost was about \$2.40. A gradual decrease in the cost then set in, continuing until July 23, when a unit cost of about \$1.98 was reached. The cost then began to rise, and on August 1 the unit cost was \$2.04 and on September 18, \$2.10. It then declined until October 31, when it reached about \$2.02. The reorganization began at this time, and as many of the operations were shut down pending reorganization, the cost increased rapidly until November 30, when it had risen to about the initial cost of \$3.08. Forgings from the Dayton Production Co. were first received about July 15, and thereafter until November 30. From about September 8 to November 30 practically all the forgings received were from the Dayton Co. Softer forgings were received after October 1. The trend of production was upward from May 28 to June 25. From June 25 to July 23 the increase was rapid, and the plat shows that except for the hard and eccentric forgings thereafter received the same trend would have continued, and that the cost of \$1.50 per shell would have been reached August 20. That this cost would have gradually increased to about \$1.77 per shell October 30, and would then have taken a downward trend to November 30, when the cost would have been only about \$1.03.

34. Mr. William W. Law, an expert accountant of many years' experience, connected with the accounting firm of Price, Waterhouse & Co., testified that the claim was prepared under his direction and from data obtained from the books of the company. (R. 448, 449.)

35. Claimant's original claim as filed before the Cincinnati District Ordnance Claims Board was for \$660,692. Later, at the request of the Cincinnati District Ordnance Claims Board, the claim was redrawn on finance forms and re-presented, showing a net claim of \$513,204. On October 21, 1920, an amended claim was filed with the Appeal Section, War Department Claims Board, in which the net amount of the claim was \$553,394.79. During the progress of the hearing and on November 29, 1920, claimant filed another amended claim, wherein the amount stated to be due was \$785,969.44.

The latter claim is marked "Claimant's Exhibit 30," and is the claim upon which claimant relies. (R. 520.)

36. The committee requested claimant's expert accountant, Law, to prepare for the committee from claimant's records a statement of claimant's expenditures on account of this contract, exclusive of any claim on account of the Russian machinery and excluding also all items of general administrative and executive overhead. This statement was prepared and handed to the committee during the hearing. It is as follows:

Expenditures for labor, material, and overhead on executive X orders-----	\$302, 280. 02	
Deduct amount of overhead included above-----	70, 587. 78	
	<u> </u>	\$231, 692. 24
Operating expenses:		
Direct labor-----	167, 804. 41	
Factory indirect expenses-----	\$446, 828. 81	
Less works expense, yard expense-----	30, 432. 58	
	<u> </u>	416, 396. 23
General and administrative expense (proportion)-----	29, 696. 43	
Less general and administrative expense (proportion)-----	29, 696. 43	
	<u> </u>	584, 200. 64
Materials on hand at Dec. 15, 1918, not included in the above:		
Unworked direct materials-----	4, 981. 22	
Indirect materials-----	79, 823. 08	
	<u> </u>	84, 804. 30
Commitments-----		19, 059. 25
Bond premium-----		3, 000. 00
Preparation of claim-----		6, 000. 00
		<u> </u>
		928, 756. 43
Deduct—Shells shipped:		
Amount of cash received-----	\$370, 344. 95	
Amount applied in reduction of Government loan-----	132, 266. 60	
Amount withheld by Government-----	26, 453. 20	
	<u> </u>	529, 064. 19
		<u> </u>
		399, 692. 24

37. Also at the request of the committee Mr. Law furnished a statement as to the Government salvage on new machinery and equipment and like salvage on indirect materials, the former being stated to be \$22,249.42, the latter \$19,207.26.

38. When Mr. Wells was last on the stand six questions were submitted to him by the committee. Mr. Wells not being able to answer them from the data then at hand promised to submit his answers in writing, which he did shortly after the hearing was adjourned. The answers submitted by him are sufficiently indicative of the questions

so that the necessity of setting out the questions is obviated. The answers so submitted are as follows:

"1. The reasonable market value of the Russian machinery about the 23d day of November, 1917, when the Platt Iron Works was notified that this contract would begin, was \$203,189.57.

"2. The reasonable depreciation in value of the Russian machinery, due solely to its use on this contract, was \$53,000.

"3. There was no increase in the value of the Russian machinery as of the date December 15, 1918, due solely to repairs and additions made thereto by claimant for the performance of this contract.

"4. \$92,539.53 is, in my opinion, a reasonable charge for the use and occupation of the plant and its machinery exclusive of the administrative and executive offices of the company from the date that you began to prepare to perform this contract up to the time that claimant ceased work thereon about December 15, 1918.

"5. Based on the figures as shown by the books of the company, \$160,152.16 was, in my opinion, a reasonable expense incident to the moving and reinstallation of the Russian machinery in order to rearrange the plant and prepare for the performance of this contract, exclusive of any general administrative and executive overhead.

"6. \$7,000 was, in my opinion, the actual cost to the company of the removal of the Russian shell-making machinery from claimant's plant upon the termination of the contract, exclusive of general administrative and executive overhead."

The committee deems it expedient to consider and determine each item of Exhibit 30, the last amended claim, in the order therein set out.

Item 1.—Raw materials—Cost plus handling charges.

(a) Unworked direct materials-----	\$4, 981. 22
(b) Indirect materials-----	79, 823. 08
	<hr/>
	84, 804. 30

The unworked materials, direct and indirect, on hand at the time the contract was suspended, were checked by Government auditors and appraisers and the amounts given above were found to be correct. The Government makes no objection to this item (R. 523). It therefore is allowed in the sum of \$84,804.30. No deduction for salvage has been made, as it is understood that it is the Government's intention to take over the property covered by this allowance, the property listed in Schedule No.1 and in Schedule No. 2 and sheets 1 to 6, both inclusive, thereunder of the claim revised October 21, 1920. In case such property, or any part thereof, is not taken over by the Government, then the salvage value of such as is not delivered to the Government should be deducted from the allowance under this item.

Item 2.—Special facilities.

Proportion of cost of facilities specially provided and paid for for the carrying out of the contract which is applicable to the unfulfilled portion of the contract.

2 (a) Reinstallation, transmission equipment for machinery on hand
from previous contracts----- \$13,772.57

Mr. Wells testified that item 2 (a) was the proportionate amount chargeable to the unfulfilled portion of the contract, for millwright work performed on motors, shafting, and transmission machinery, including the cost of belting and other miscellaneous supplies necessary to connect up the machinery for work on this contract; practically all of the expense was involved in the alteration and reinstallation of the Russian equipment (R. 526); at the time he prepared the original estimate he took into consideration the fact that such expense would be necessary but did not figure it out in detail (R. 529); the machinery would not have been reinstalled except for this contract, as it was claimant's purpose to dispose of all of the Russian machinery, and that except for this contract no repairs would have been made upon such machinery, as it was to be sold in its then condition; this work was performed pursuant to X-order No. 4842 (R. 525), against which the cost was charged.

Objection was made by the Government to this item, in so far as it included what are termed "accrued repairs." Mr. Wells testified that the amount of accrued repairs involved in this item was practically negligible (R. 542).

Mr. H. W. T. Collins, of the Cleveland ordnance district claims board, a graduate engineer, and for several years a professor of engineering in the University of Cincinnati, gave his opinion that Mr. Wells's statement in this respect was correct, as this item applies to the reinstallation of the transmission machinery (R. 542).

In a conference between representatives of claimant and representatives of the Ordnance Department, certain items included in the sum, of which \$13,772.57 is stated as the unamortized portion, were objected to, and claimant finally consented that \$8,634.34 was the unamortized portion of this amount properly chargeable to the contract, in which amount the board includes an allowance in the award under item 2 (a) (R. 539 and 542.).

2 (b) Machinery, furniture, and fixtures, including installation----- \$21,049.13

A large number of X orders are involved in this item and are referred to at page 543 of the record. The total expenditures claimed, as shown by the books of the company included in this item, are \$51,541.98. It is claimed that, after deducting the salvage value of \$21,099.96, the unamortized portion of the balance, \$30,442.02, should be allowed, and that such unamortized portion is \$21,049.13.

These X orders cover the purchase and installation of tools and equipment required for this contract (R. 544), the items thereof being shown on sheet 2 of Claimant's Exhibit No. 31 and in Schedule No. 5 attached to the claim, revised October 21, 1920.

The original total cost claimed under this item was \$62,511.22. The salvage value is stated to be \$21,099.96, leaving the net amount originally claimed under this item \$41,411.26.

After a conference with the ordnance officers and accountants, claimant eliminated certain items for which cost had been included, leaving the total cost \$51,541.98 as claimed, and the salvage value \$21,099.96. The items eliminated are marked with a pencil X on the left-hand margin of Claimant's Exhibit No. 31. By these eliminations the claimed unamortized portion of the cost was reduced to \$21,049.13 (Cl. Ex. No. 30).

All of the X orders involved in this item included outside purchases, and many of such orders included stores taken from claimant's storeroom, direct labor, and bonuses paid workmen. The Government objected to the bonuses, and Mr. Wells explained that bonuses were necessary in order to keep the men at work, and that the bonuses allowed and charged were only about 7 per cent of the wages paid (R. 551). The bonuses were paid in good faith, and doubtless obviated increased wages. As a matter of fact, the bonuses were a part of the labor cost, and there appears to be no reasonable objection to the allowance of the amount so paid, as claimed.

A per cent on stores, amounting to \$126.12, is included in this item, based on claimant's experience for several years. This percentage was included in order that claimant might be reimbursed for the exact cost of stores furnished, including loss through shrinkage due to various causes, embracing, in the case of iron, an allowance to take care of the loss on small pieces which resulted in cutting other pieces from larger ones. Mr. Wells testified that the percentage charged varies as to different materials, but averages about 10 per cent; contains no element of profit; is fair and just; that a similar percentage had been allowed on other Government contracts; that such an allowance was necessary to show the true cost of stores used, and that such a charge was in accordance with claimant's usual custom (R. 548). The percentage claimed is not unreasonable, is, in fact, a part of the actual cost of the materials furnished, and is allowed.

The principal objection to item 2 (b) is on account of the overhead charged, the proportion of machine, erecting, Smith, and pattern shops, and for drafting and yard overhead charged being about 121 per cent of the direct labor involved. The Ordnance officers contended that such overhead should not have exceeded 100 per cent, and that any percentage in excess of that amount was due to claimant's mismanagement and inefficiency. In other words, the Government contended that the total overhead charged, \$2,598.49, should be reduced by the amount that it exceeds 100 per cent of the direct labor, which would amount to a deduction of \$629.92 on this item.

Mr. Wells testified that he included in his estimate an item for the cost of necessary new machinery, and that the expense charged in this regard was for special equipment paid for by the company and purchased solely for use on this contract (R. 545). Both he and Mr. Law testified that the statement as set up shows facts gleaned from the company's books. Invoices and X orders with labor tickets attached were produced in order that the ordnance officers might examine them, and with the exceptions heretofore stated, no objections were made.

The fact that the overhead appears high is not in itself sufficient to justify a reduction of this item from the amount as shown by claimant's books to such sum as Ordnance officers and accountants, in the light of their experience, believe should be a proper percentage of overhead to be allowed. No general administrative overhead is included in the charge under this item (R. 554). Mr. Law went into detail as to the items considered in prorating the overhead (R. 554), and no objection was urged to the various items upon which the overhead was computed. Under the circumstances, there appears no good reason why the percentage of overhead should be reduced, as there is no evidence which justifies a finding that what is claimed to be excessive was the result of other than an honest effort to fulfill the terms of the contract, and while it may have been higher than it might have been, yet in an attempt to arrive at a fair and just settlement of the contract, in order to justify a reduction below the actual amount expended, there should be established fraud, improper charges, or such mismanagement as would amount to the negligent conduct of claimant's affairs, none of which is established in this case.

The total expense claimed as the basis for the amount set up under this item should be reduced by the sum of \$935, the amount charged for a shell banding press and a hydraulic pump, which claimant consented might be eliminated from the charge under X order 1454 and therefore the total cost should be considered only as \$50,606.98. As claimant retains this property the salvage value of \$21,099.96 should be deducted, which would leave \$29,507.02 to be amortized, the unamortized portion of which would be \$20,412.62, which sum is allowed under item 2 (b).

2 (c) Difference between actual and normal cost of building erected
for the execution of the contract----- \$6,997.13

This item is based on the theory that the addition, costing \$24,414.16, constructed especially for use on the contract during the period when building costs were excessively high, due to war conditions, would not be worth to the contractor after the completion of the contract more than the normal cost of \$14,294.64 (R. 836).

(See schedule 6 of claim revised October 21, 1920.) The addition to the shell shop provided additional space for machines, storage, offices, rest rooms, and toilet facilities (R. 838). At the time the estimate was made claimant knew that such an addition would be necessary, and included the cost thereof as an item in its estimate. It has been customary for the Ordnance Claims Board to make allowances for excessive building costs (R. 837). No objection to the allowance of this item was made by Ordnance officers, other than that the rate of overhead is excessive (R. 837). What has been said under item 2 (b) with reference to overhead is equally applicable here. Hence, the item should be allowed in the sum of \$6,997.13 as claimed, as such sum represents the unamortized portion of \$10,119.52, the excess cost.

2 (d) Equipment for machine tools----- \$51,627.61

This item is covered by X orders. The total expense claimed under these X orders is \$75,695.18, claim being here made for the unamortized portion. The X orders involved are listed on page 839 of the record. The items are stated in schedule 7 of the claim revised October 21, 1920. The general objections that the overhead charged against these X orders was excessive, and that bonuses paid workmen and the per cent on stores should be disallowed, apply to all orders involved in this item. What has heretofore been said under item 2 (b) with reference to overhead, bonuses, and percentage on stores applies with equal force to the X orders in question. Other objections applicable to some of these X orders are:

- (1) That the cost of the gauges, master gauges, and nosing dies was excessively high.
- (2) That the item includes accrued repairs.
- (3) That current repair work was also included.

X orders 4938, \$260, and 4939, \$20,167.91—(1) Gauges: The testimony establishes that the usual source of supply for gauges and master gauges was exhausted on account of the unprecedented demand. The Government promised from time to time to supply the necessary master gauges as it had contracted to do, but none were supplied by it, and it was not until about June, 1918, that claimant was furnished sufficient information by the Government from which it could prepare the master gauges. Claimant made every effort to purchase the necessary gauges, but was unable to do so, and it did the only expedient thing, that was to undertake to manufacture them in its own shop.

On Exhibit 31 the amount charged against X order 4939 is \$20,125. On Exhibit 41 "Statement of sundry X orders," there is an item of \$42.91 charged against this X order for gauges. This is explained by the testimony of Mr. Harris that at the time Exhibit 31 was made

up, all of the items chargeable against X order 4939 had not been posted. The items charged against these X orders are for expense in the purchase, making, and repairing of gauges. Some of the gauges used had been prepared for use on the Russian contract, and the cost of these gauges to the amount of \$3,010 is included in the charges under these X orders (R. 696). There is also included in these charges the expense of fitting certain of the Russian gauges for use on this contract. This expense is considered a proper charge against this contract, but the cost of the Russian gauges is not so considered, and the gross cost for the equipment included in item 2 (d) is reduced by the sum of \$3,010.10 on account of the Russian gauges charged against X orders 4938 and 4939. Therefore, the unamortized portion as claimed under this item should be proportionately reduced.

The appraisal committee examined all gauges on hand shortly after the contract was suspended, estimated the original cost of the gauges, and allowed 50 per cent of the estimated cost of all gauges which had been used, and the full estimated cost of unused gauges. This was an arbitrary method in use by Ordnance Department appraisers, and, no doubt, was satisfactory in most cases, where the original cost of gauges was not susceptible of definite ascertainment, but in this case where the amount of money actually expended for gauges is established, though not the cost of individual gauges, and where on account of high experimental expense in connection with making the gauges, an inspection of gauges on hand would not reflect their actual cost, it would seem more equitable to take the total cost of the gauges and amortize it over the contract, allowing the unamortized portion.

(2) **Accrued repairs:** The objection that the expense of accrued repairs on Russian equipment is improperly included in this item is without merit. As a matter of fact, the testimony shows that the amount of accrued repairs included is very small, on each X order less than 10 per cent of the amount charged. Under the facts of this case the Board finds that an allowance is proper for the cost of the initial repairs, generally termed accrued repairs, on the Russian machinery necessary to fit it for use on this contract. Both claimant and the Ordnance representatives understood that this machinery had been used in the manufacture of Russian shell; that the greater part of it had been removed from the shell shop; that the machinery must of necessity have certain repairs and modifications and additional equipment before it could be used on this contract; that the machinery in the shell shop would have to be rearranged and that which had been removed must be reinstalled before work could be commenced. Such expense was contemplated by claimant and included in its original bid.

(3) Current repairs: No current repairs are charged against X orders included in item 2 (*d*) (R. 744). Hence, the Government's objection in such respect is without merit.

The other X orders involved in item 2 (*d*) will be referred to by number, only when items contained in the X order of the number referred to were objected to by the Government, and the objection is sustained; or where for some other reason deemed sufficient by the Board the sum or a part thereof charged against an X order is disallowed.

X order 1256.—This X order covered the purchase price, \$48, of steel purchased from the Monarch Engineering Co., of Dayton. The witnesses were unable to state that this amount was not included under some other item, hence it is disallowed.

X order 1706.—This X order, charged at \$147.09, is not included in the total charge under item 2 (*d*), though stated to be included by Mr. Harris (R. 839). Hence, no allowance is made therefor.

X order 1635.—The amount charged against this order, \$400.28, is for expense incurred in installing an additional foundation for a heat treating furnace erected by the General Combustion Co., so that the heat treating furnace would function as intended, as a special facility in connection with the execution of this contract.

The furnace was installed under a written contract (Claimant's Exhibit 56). If the additional foundation charged for under this X order was a necessary part of the heat treating apparatus (the contract price of which has been allowed without question) in order that the heat treating furnace should function properly, then the construction of the foundation should have been paid for by the General Combustion Co. There are not in the record sufficient facts from which the committee is able to determine whether the additional foundation should have been paid for by claimant or by the General Combustion Co. under the terms of the contract. However, the necessity of determining this question is obviated by claimant's settlement contract with the General Combustion Co., dated August 26, 1918. Under the terms of such settlement contract claimant must look to such company for relief and not to the Government. This item in the sum of \$400.48 is disallowed.

X-order 5033.—What has been said with reference to X-order 1635 applies with equal force to X-order 5033, under which a claim is made for expense of additional labor in erecting "oil gas" nosing furnace, \$1,730. However, this item was withdrawn by claimant at the hearing. (Memorandum on behalf of claimant, p. 20.) Hence, the sum of \$1,730 is also eliminated from item 2 (*d*).

Sundry X-orders (\$2,315.88).—These X-orders are listed in claimant's Exhibit No. 41 (R. page 1326), and the character of the work

done under them is also shown in said exhibit. Mr. Wells also went somewhat into detail with reference to these sundry X-orders in his testimony shown at pages 799 to 801 of the transcript.

The property to be retained by claimant, covered by the salvage allowance of \$1,029.46, is listed in schedule 7 of the claim revised October 21, 1920.

There is no evidence of any improper charge under these sundry orders, and no objection has been urged to the amounts claimed thereunder other than the general objections to X-orders which heretofore have been considered. The sum \$74,665.72, being the alleged cost less a salvage value of \$1,029.46, made the basis of the proportionate charge under item 2 (*d*) is reduced by the amount of the total eliminations heretofore made, \$5,188.38 to \$69,477.34, which reduces the amount of item 2 (*d*) to \$48,040.10, in which sum it is allowed.

2 (*e*) and 2 (*f*). Proportion of items of cost which contractor claims should be properly included and amortized under the classification of special facilities.

Item 2 (*e*) is equipment for handling and shipping shells, \$3,542.98, being cost of reproduction new, less a salvage of \$1,000.

Item 2 (*f*) is machinery on hand from previous contracts for Allied Governments, including power and transmission equipment, \$94,773.98. The total of these two items is \$98,316.94. The machinery referred to in each item was used for machining Russian shell (R. 840), and both items will be considered together.

Claimant contends that this machinery was retained by it at the demand of ordnance officers in order that it might be used in filling orders for the machining of shell forgings for the Government, and that this machinery should be considered as special machinery provided for the performance of this contract under subparagraph (4) of paragraph 3, Supply Circular 111. Therefore claimant asks that the value of this machinery be amortized, or that in lieu thereof, an allowance be made for its depreciation. Mr. Wells estimated the value of the equipment at \$203,189.57 as of the date the contract was awarded, and Mr. I. O. Cunningham estimated it to be worth \$297,286, when the contract was suspended, based on its original cost of \$379,000 in 1914 (R. 353). Claimant insists that it understood that the secondhand value of this machinery was to be absorbed in the price it was to receive for the shell. As evidence of such understanding, the board's attention was invited to the letter from Mr. Wells to the Ordnance Department, dated October 30, 1917, quoted in paragraph 4 above (Cl. Ex. 2, R. 1219). While, no doubt, it is true that the Ordnance Department knew of the existence of the Russian machinery and was desirous that it, as well as all other machinery in the country suitable for machining shell, should be so

utilized, and that Majors Cheston and Franklin of the Ordnance suggested and perhaps advised the retention of the machinery in anticipation of this contract (R. 318, 330); yet it is the opinion of the board that the retention of the Russian machinery was not under circumstances bringing it within the terms of subparagraph (4) of paragraph 3, Supply Circular 111; but that such machinery was retained by claimant in the exercise of its best business judgment after claimant had determined it would be of greater financial advantage to use the machinery in machining forgings for the Government, than to dispose of the machinery. Hence, the cost of the Russian machinery can not be amortized. This machinery had an inflated value at the time the contract was entered into because of the war, and such value depreciated on account of the cessation of hostilities. Such depreciation was assumed as a business risk when the contract was entered into, for such depreciation the Government is not liable.

There was, of course, a depreciation in the value of the Russian machinery, due solely to its use on this contract. Such part of the latter depreciation as was not due to engineering changes referred to in paragraph 7, *supra*, has been absorbed in the price claimant has received for the finished shell. Such as resulted from engineering changes is an item for which claimant should be recompensed. The amount of such compensation is difficult of ascertainment. The only direct testimony as to depreciation due solely to use on this contract is that of Mr. Wells found in his answer to questions submitted by the committee during the hearing (par. 38).

Mr. Wells' estimate of \$203,189.57, as the value of the Russian machinery at the time its use was begun on this contract, is believed to be fair.

He estimated the amount of its depreciation due solely to use on this contract at \$53,000. However, in its amended statement filed January 14, 1920, claimant stated this depreciation to be \$47,600. The latter item is found to be reasonable, and claimant should not now be heard to say that the depreciation was in excess of the sum then claimed.

Accepting Mr. Wells' estimate of the value of the Russian machinery at the beginning of the contract, it is believed that the normal accelerated depreciation due to use on this contract, except the depreciation due to hard and eccentric forgings, would not exceed 10 per cent, or \$20,318.95. Deducting this sum from the total depreciation of \$47,600 would leave \$27,381.05 as the depreciation due to engineering changes, which sum the board allows in lieu of Items 2 (e) and 2 (f), which are disallowed.

Item 3.

Commitments ----- \$19,059.25

This item represents the amount that claimant paid out in settlement of its outstanding commitments. (See schedule 9 of claim revised Oct. 21, 1920.) No question has been raised as to claimant's good faith in making these settlements, or as to the amount thereof. (R. 856.) Hence, this item is allowed in full in the sum of \$19,059.25. If the last three items charged under schedule 9 for annealed high-speed steel and round annealed high-speed steel, amounting to \$5,562.87, are retained by claimant, their salvage value should be deducted from the amount herein allowed. If taken over by the Government, there should be no further payment on account thereof.

Item 4.—Other Compensation.

4 (a) Proportion of alteration and repairs to machine tools applicable to the unfilled portion of the contract----- \$80,544.01

This item is based entirely on X orders, the numbers of which are set out on page 857 of the record, and the items of which appear on claimant's Exhibit No. 31 and on Schedule No. 10 of the claim as revised October 21, 1920. The total amount of these X orders is \$116,605.66, from which is deducted a salvage value of \$120, leaving \$116,485.66, of which the amount claimed, \$80,544.01, is 69.145 per cent.

The general objections that were urged against items 2 (b) and 2 (d) were also made to the allowance of this item, viz:

- (1) The percentage of overhead is too high.
- (2) The bonuses paid workmen should be disallowed.
- (3) The per cent on stores is an improper charge.
- (4) The expense of accrued repairs is not allowable.
- (5) Expense of current repairs should not be considered.

For the reasons stated under items 2 (b) and 2 (d), objections (1), (2), (3), and (4) are disallowed. Objection (5) is sustained in so far as items for current repairs are included under any X-order charge.

Reference by number to the X orders involved will be made only where the X order is subject to objection (5), or where some specific objection has been made, or where for any reason the charge under an X order is disallowed or reduced.

X order 4857.—The committee originally investigating the claim for the Cincinnati district ordnance claims board was unable to segregate the work done under this X order from that done under X order 4855, and the committee considered the two X-orders as one item. The testimony of Mr. Biddle, however, shows that the work done under this X order is entirely separate and distinct from the

work done under X order 4855. The amount charged against this X order is a proper charge.

X order 1487 (\$634).—This item is for fire brick and fire clay for the heat treating-furnace installed by the General Combustion Co. (R. 1044). It is disallowed for the same reasons as stated under item 2 (*d*), X order 1635.

X order 1807 (\$145—Cl. Ex. 50).—Claimant concedes that the entire amount covered by this X order is for current repairs. (R. 828—Claimant's memorandum, p. 24.) Hence the entire amount of this item should be disallowed.

X order 4853 (\$70,277—Cl. Ex. 51—R. 828).—The Government specifically objected to the allowance of this item in full because the equipment was surplus, and recommended the allowance only of \$1,560. Mr. Biddle testified that there were no current repairs, and that no surplus equipment was charged for under this X order (R. 828–829). The amount is allowed as claimed.

X order 1502 (\$5,240.66).—This item covers drawings, labor, and material for alterations to twelve heat-treating furnaces. These furnaces have no connection whatever with the heat-treating furnaces installed by the General Combustion Co. The Government made no objection whatever to the allowance of this item, except in so far as it was claimed that it included an excessive percentage of overhead (R. 833). The Board has heretofore passed upon the objection to overhead charges renewed here, and has decided that such objection is without merit. Hence, the amount charged under this X order is allowed in full.

After deducting \$779, the total eliminations from the claimed total cost, there remains \$115,826.66. Reducing this sum by the salvage value allowed, \$120, there remains a net total cost of \$115,706.66, the unamortized portion of which is \$80,005.36, in which sum item 4 (*a*) is allowed.

4 (*b*) Excess cost to get into production, \$37,549, proportionate part of \$54,305 early excess cost allocated by claimant to the unfilled portion of the contract.

Mr. Wells testified that in the early stages of the contract the percentage of overhead was much higher than in the latter stages, due to the "inefficiency and ineffectiveness of the labor and inefficiency of your organization" for the two or three months of the contract (R. 935), and due in part also to the fact that the Government did not furnish claimant forgings in sufficient quantities in order to make the necessary experimentation and keep the skilled labor continuously employed on the character of work which it was hired to perform (R. 936), necessitating the use of such labor on other work in order to keep the organization together; that this early excess cost was

about 22 cents per shell, or a total of \$54,305. It is a well-known fact that in the early stages of manufacture in contracts such as this, the cost of production per unit is much higher than in the latter stages, and that by increasing the production in the latter stages of the contract the contractor is able to recoup his losses occurring in the early stages. This early excess cost is, of course, not a matter susceptible of definite ascertainment. The estimate of Mr. Wells appearing reasonable to the Board and there being no testimony in controvention thereof, item 4 (b) is allowed as claimed in the sum of \$37,549.

4 (c) Excess cost due to engineering changes----- \$271,525

Article V of the contract provides that the contracting officer may by written notice to the contractor make changes in the drawings and specifications which relate to the contract, or in the provisions whereby the United States undertakes to furnish materials; that if such changes involve substantially additional expense, a fair addition will be made to the purchase price, and that no claim for additional compensation on account of such changes will be allowed unless the same was ordered in writing. The changes in the forgings specifications herein referred to were in writing. No notice, however, of these changes was given claimant, and it had only such notice as was given it from time to time by the changed character of the forgings. It can not be denied that the change in the forgings specifications involved substantially an additional expense to that originally contemplated. The ordnance officers familiar with the transaction have not denied that claimant is entitled to additional compensation on account of the excess cost due to these engineering changes. The only questions are as to the method of determining the amount of this cost and the sum to be allowed therefor. The contract does not in terms provide that the excess cost due to engineering changes will be absorbed. It contemplates that an addition will be made to the contract price on account of these changes. Ordinarily, this matter would have been the subject of a supplemental agreement. However, no such agreement was entered into, and it becomes a duty of the Board to determine the amount that will fairly and justly compensate claimant for the excess cost incurred on account of the engineering changes in the forgings.

Mr. Wells, claimant's vice president and its general manager up until about the 1st of July, 1918, gave his opinion that this excess amounted to \$271,525. He based his opinion upon the company's experience in the manufacture of Russian shell under the Bethlehem Steel contract. If these shell had been of the same kind and character and manufactured under the same conditions as were the Government shell, this comparison would, of course, be of great evidentiary

value. Though the character of the Russian shell was different from the Government shell, and also the conditions under which they were manufactured were different, it might be possible by additions and eliminations to equalize these differences so that an opinion based on a comparison of costs would be of value. However, the opinion of Mr. Wells is based upon his own estimate in equalizing the conditions between the two contracts, and, therefore, is merely an estimate based on an estimate, and is entirely too far remote from the facts to be controlling in the determination of the amount that should be allowed under this item.

If claimant had kept its books so as to show the expense of such excess cost, it would have been a comparatively easy task to calculate the amount to be allowed under this item. The fact that the books were not so kept is probably as much the fault of the Government as of claimant, because the Government failed to notify claimant of the changes in the forgings specifications. Of course, before the excess cost can be determined a normal cost must be fixed. We are not satisfied that the normal cost arrived at by Mr. Wells in the manner indicated is correct. Nor are we satisfied that the method suggested by the Ordnance Claims Board that the allowance under this item should be the difference between the contract price and the total cost of the shell delivered is a reasonable method of calculating the amount due under this item. It has occurred to the Board that a method of computation equally as logical as that suggested by Mr. Wells or the Ordnance Claims Board would be as follows: Subtract the unit cost of July 23, 1918, approximately \$2, less the proportionate share of the early operating expenses, from the unit cost of the total operating expenses plus the spoiled forgings as shown on Exhibit 54. This would give an excess unit cost of about 26 cents per shell. The Board does not adopt this method of calculation, or suggest that it is infallible. However, it is believed from all the facts and circumstances in evidence that an allowance of 26 cents per shell for the 246,841 completed shell would be a fair and equitable allowance on account of the excess cost due to the engineering changes in the forgings. The Board has no doubt if the changes in the forgings specifications had been presented to claimant with an offer to increase the unit price of the shell 26 cents that claimant gladly would have accepted the offer. While claimant may have incurred expense on account of the hard and eccentric forgings in excess of the amount suggested, it is the opinion of the Board that an allowance of \$64,178.66 will amply compensate claimant for such part of the excess cost as should be borne by the Government in view of other allowances that are made claimant in this opinion. Item 4 (c) is therefore allowed in the sum of \$64,178.66.

4 (d) Special facilities due to engineering changes----- \$14,104.65

This item is covered by several X-orders (R. 863) and includes the expense of rebuilding Reed stud lathes for centering shell; drawings, labor, and material for making three recentering machines out of stud lathes; loose pulley for Le Blonde lathes; equipment for end facing on P. & J. and Le Blonde lathes; tools and equipment for semifinished turning; drawing, labor, and material for making cast-iron cams for semifinished turning; drawings, labor, and material for rearranging machinery in shell shop; two drill presses, Minsker; two drill presses, Colburn; two drill presses, Baker; and one Gardner grinder, No. 4. No question is raised by the Government as to the necessity of the items for which this charge is made, and no objection is made to the amount charged. This item, therefore, is allowed in the sum claimed, \$14,104.65.

4 (e) Proportion of bond premium----- \$2,074.35

The bond premium here charged for is the proportionate part of \$3,000 paid to the United States Fidelity & Guaranty Co. for a bond required by the War Credits Board as a prerequisite to a loan of \$300,000 obtained from the board by claimant. A similar allowance was made in the claim of Towar Cotton Mills (Inc.), part 1, Volume V, page 61, Dec. B. C. A. It has been customary for the Cincinnati district ordnance claims board and the Ordnance Claims Board to allow bond premiums for bonds of this sort, and it is, of course, an expense incident to the contract; accordingly the unamortized portion of the premium, \$2,074.35, is allowed.

4 (f) Extra costs of preparing claim----- \$6,000

The firm of Price, Waterhouse & Co., public accountants, were employed by claimant prior to the suspension of the contract, in connection with the engineering firm of Ford, Bacon & Davis, and representatives of Price, Waterhouse & Co. were working upon the books of claimant prior to the suspension. The charge here made is for extra work done by employees of Price, Waterhouse & Co. in preparing the claim for presentation to the Cincinnati district ordnance claims board in accordance with forms furnished by that board, and for subsequent accounting work in connection with the claim. It does not include any charge for the preparation and filing of the original claim, which was filed before finance forms were available. There is no question as to the amount of expense. The testimony clearly shows that extra expense, at least, to this amount was incurred by claimant. The testimony also shows that it has been the custom of the Cincinnati district ordnance claims board to make an allowance for such expense, under circumstances similar to these, and that it was a custom of the Ordnance Claims Board to approve settle-

ments recommended by the bureau boards including similar items. In addition to this, Col. Booton testified that it has been the custom of the Ordnance Claims Board to allow for the expense of preparation of the claim where services rendered were considered of benefit to the Government. In answer to a direct question by claimant's counsel as to whether or not the services of the representatives of Price, Waterhouse & Co. in this particular case were of benefit to the Government, Col. Booton stated that some assistance had been rendered, but that he was unable to say what the value of that assistance was (R. 887).

The Board of Contract Adjustment and the Appeal Section have consistently declined to authorize the allowance of similar expense. If it were an open question this Board would be inclined to follow the practice of the Cincinnati district ordnance claims board and the Ordnance Claims Board, and allow this item. But, in view of the precedents established by the Board of Contract Adjustment and the Appeal Section, by which this Board feels bound, item 4 (*d*) is disallowed.

4 (*g*) Amount withheld by Government on shells invoiced----- \$28, 453. 20

This amount, 5 per cent of the contract price of the delivered shell, was withheld by the Government under Article III of the contract, and upon final settlement will be paid to claimant. This is a matter with which this Board is not concerned.

4 (*h*) Salvage retained by Government----- \$23, 249. 42

The property to be retained by the Government (other than that, the cost of which has been fully amortized and would thereupon become the property of the Government) and the appraised value thereof has been agreed upon. The figure above stated represents such agreed value, and schedule 14 and schedules therein referred to describe such property. If the property so agreed upon is delivered to the Government by claimant, then the amount so agreed upon is allowed and should be paid claimant. Proportionate reduction will, of course, be made for any property included in the schedules above referred to which is not so delivered.

Item 5.

Interest to Dec. 15, 1920, on Government loan from Jan. 28, 1918---- \$28, 862. 86

Claimant borrowed \$300,000 of the War Credits Board for the purpose of purchasing materials to be used in the performance of this contract. This money was so used, and under paragraph 47 of the pamphlet, entitled "Definition of Costs Pertaining to Contracts," dated June 27, 1917, made a part of the contract by reference, the interest paid and to be paid on this loan is a proper element of cost

for which claimant is entitled to an allowance. (Towar Cotton Mills (Inc.), \$2,466, pt. 1, Vol. V, p. 61, Dec. B. C. A.; Crown Cork & Seal Co., \$1,945, Vol. IV, p. 136, Dec. B. C. A.) This Board will not undertake to compute the amount of this interest, as it appears that at least a portion of the loan remains unpaid, and that the amount of interest will vary from day to day. The amount to be allowed under this item is therefore left undetermined, to be computed to the date of final settlement, and then adjusted.

GOVERNMENT PROPERTY UNACCOUNTED FOR.

Spoiled forgings, etc----- \$45, 412. 83

This item consists of 35,909 spoiled and unaccounted for forgings valued at \$43,090.80; 21,749 copper bands spoiled or unaccounted for of the value of \$1,913.91; 179 packing boxes unaccounted for of the value of \$408.12. All of these materials were furnished by the Government, and their total value of \$45,412.83 remains to be accounted for.

A normal spoilage on the forgings would have been about 5 per cent, and the amount of such spoilage should have been absorbed in the price claimant received for the finished shell. A portion of the copper bands were disposed of to other Government contractors, and it is believed that the entire amount of unaccounted for copper bands should be borne by claimant, as should also the value of the missing packing boxes. If claimant had been permitted to continue operations, it doubtless would have been enabled to reclaim a portion of the spoiled forgings and to have absorbed a percentage of the loss on those spoiled in the early operations, and as the result of experiments on account of the engineering changes. Under the circumstances it is believed that an allowance of \$17,825.85 on account of spoiled forgings will fully compensate claimant for all such loss for which the Government is responsible. Hence, for such spoilage an allowance is made of \$17,825.85. Claimant, of course, will be required to pay the Government the full value of the materials spoiled and unaccounted for.

Work in process----- \$24, 590. 36

At the time work was suspended, 39,301 shell, in various stages of production, were in process. In the revised claim of October 21, 1920, there is included a claim of \$24,590.36 under the head of "Partly finished products on hand—cost of labor and overhead (material furnished by United States Government)." Schedule 3 of the claim referred to shows a total direct labor charge of \$6,440.81 and an overhead charge of \$18,149.55, being 281.79 per cent of the direct labor charge, making a total charge under this item of \$24,590.36. No similar item appears in the last amended claim (Cl. Ex. 30).

Inquiry of claimant's counsel discloses the fact that in the last set up of the claim (Cl. Ex. 30) this charge was included in the charge for early excess cost, and that a portion of the early excess cost theretofore claimed was allocated to engineering changes. The method finally adopted by claimant in setting up the claim for cost of work in process is not of great importance at this time, if, as a matter of fact, it has not already been considered under some of the items heretofore passed upon, as it is an item of expense to which claimant is clearly entitled.

No allowance has been made for the cost of the work in process. Such cost was not considered or allowed in the item of excess early overhead. In the staff report and auxiliary staff report the cost of the work in process was stated to be \$23,666.76. An allowance is made in the sum of \$23,666.76, as the cost of the work in process. No percentage on this amount is allowed, as the Board believes that this allowance, together with other allowances made, is ample to effect a just and equitable settlement of the claim.

The Ordnance Claims Board having heretofore issued its Certificate "C" with documents attached showing the nature, terms, and conditions of the agreement, such certificate and documents are affirmed.

DISPOSITION.

The Appeal Section, War Department Claims Board, hereby transmits its decision to the Ordnance Section, War Department Claims Board, for appropriate action.

Lieut. Col. McKeeby and Capt. Frazer concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

JANUARY 28, 1921.

Case No. 1672.

In re **CLAIM OF AMERICAN STEEL & WIRE CO.**

1. **INFORMAL AGREEMENT.**—Where a contract provides for the delivery of unassembled spare parts for airplanes, and the contractor is thereafter directed by an agent of the Secretary of War to assemble these parts, the Government is obligated under the act of March 2, 1919, to pay the contractor for the assembling of the spare parts.
2. **CLAIM AND DECISION.**—Claim for \$74,592.51, arising through an informal order for the assembling of wire and cable parts for airplanes. The principal facts are stated in a decision reported in Volume V, page 426. On appeal the Secretary of War set aside the decision of the Board of Contract Adjustment and remanded the claim to the Appeal Section, War Department Claims Board, for further proceedings. Held, the purchase order and formal contract did not provide for the assembling of spare parts and claimant is therefore entitled to remuneration under the act of March 2, 1919, for assembling these parts.

Capt. Miller writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim for \$74,592.51 was decided adversely to claimant in a decision of the War Department Board of Contract Adjustment dated May 15, 1920, reported in Volume V, page 426.

2. The case was presented as a class B claim under the act of March 2, 1919, and covers the cost of assembling 500 sets of wire and cable parts. On April 13, 1918, claimant was issued Purchase Order No. 20952 for 500 such parts as per prints in its possession, this being confirmed by a formal contract, No. 3624, dated April 16, 1918, for the same services. Claimant insisted that neither the purchase order nor the formal contract contemplated the assembling of the parts, and therefore alleged an informal agreement under the act of March 2, 1919, for the work of assembling, performed at the direction of Government officials. The Board of Contract Adjustment held that the contract was not ambiguous and that it obligated claimant to assemble the parts. The claim based on the informal agreement was rejected. Claimant thereafter took an appeal to the Secretary of War.

3. On December 8, 1920, the Secretary of War remanded the claim to the War Department Claims Board with the following order:

"Upon consideration of the appeal and record in this case I can not concur in the view of the Board of Contract Adjustment in its decision of May 15, 1920, that the contract was free from ambiguity and that contractor is expressly bound by the contract, irrespective of the evidence, to do the work of assembling. I do not desire at this time to determine whether or not the duty of assembling the parts was included in the formal contract dated April 13, 1918; I simply hold that the contract was ambiguous and direct further proceedings accordingly. The decision of the Board of Contract Adjustment will be vacated and further proceedings had.

"NEWTON D. BAKER,
"Secretary of War."

4. The principal facts are related in the former decision. However, since the date of the original decision there has been added to the record considerable new evidence bearing on the question of assembling the parts which will be of assistance in construing the ambiguity relative thereto.

5. First Lieut. James M. Eckels, the officer who negotiated the purchase order and the contract on behalf of the Government, has furnished an affidavit reading in part as follows:

"At the time of my negotiations with the American Steel & Wire Company (hereinafter called the contractor) there were in the contractor's possession certain photographic copies of British prints (hereinafter called the British prints). These British prints had been given to the contractor in order to give it information as to the nature of the cable and wire parts which it was to furnish. It was never intended by me that the contractor should do anything else but furnish separately for later assemblage by another manufacturer the wire or strand shown on these British prints, and that these prints should be used by the contractor to show the required lengths, diameter, and strength. It will be noted that the British prints show the wire and cable parts 'assembled,' with the fittings; that is, put together with the fittings and with the loops wrapped. It was not intended by me that the contractor should assemble the wire and cable parts which it was required to furnish. Indeed I remember distinctly telling Mr. Kirkley, the contractor's representative, at the time of our negotiations that the contractor would not have to assemble the parts as shown on the British prints, but would only have to furnish them unassembled. In this connection it will be noted that the British prints were not accompanied by any instructions as to the method in which the assembling should be done. I confirmed in writing our understanding that the contractor would not be required to do any assembling. (See my letter to the contractor dated March 22, 1918.)"

The confirmation letter of Lieut. Eckles, dated March 22, 1918, addressed to claimant reads as follows:

"1. Confirming previous letters, it will not be necessary for your company to make on quantity production assemblies * * *."

"2. You will manufacture the cable and wrapping wire necessary for these assemblies but will ship these parts directly to the point of assembly of the machine where the end fittings will be put on."

6. Capt. F. D. Schnacke, who signed the contract for the Government, states in an affidavit that he had intended to incorporate in the contract the terms negotiated by Lieut. Eckels, and that he had later entered into an informal agreement with claimant for the assembling of the spare parts, although a definite price had not been fixed.

DECISION.

1. By direction of the Secretary of War, as set forth in the foregoing order of December 8, 1920, the decision of the War Department Board of Contract Adjustment, dated May 15, 1920, denying relief, is hereby vacated and set aside.

2. The contract itself is ambiguous as to whether the contractor was to assemble the wire and cable parts. However, the extrinsic evidence now in the record enables this Board to construe the uncertainty of meaning contained in the clause in question.

3. The statements made by Lieut. Eckles to the contractor while the contract was under negotiation to the effect that the contractor was not to assemble the parts; his letter to the contractor confirming this understanding; the affidavit of Capt. Schnacke showing his participation as the contracting officer; and the acceptance by the Government of the two unassembled sets of parts prior to the issuance of the purchase order and the execution of the formal contract show the contract to have one, and only one, logical meaning. That meaning was that the parts were to be delivered unassembled.

4. Furthermore, Capt. Schnacke's letter of April 17, 1918, advising claimant to recognize instructions from the Standard Aircraft Corporation, followed by specific instructions from the Standard Aircraft Corporation to ship the parts unassembled, give further evidence as to the real significance of the contract, and confirm claimant's contention that the contract did not require the assembling of the parts.

5. Capt. Schnacke's confirmation of the instructions of May 14, 1918, issued by the Standard Aircraft Corporation to claimant, calling for the shipment of assembled parts, constitutes an agreement under the act of March 2, 1919, whereby the claimant was to assemble the wire and cable parts and the Government was to remunerate claimant for its services in performing this work. Capt. Schnacke and the contractor came to an understanding that the contractor was to be paid for the assembling of the wire and cable parts, but, although several letters were exchanged relative to the

price, a definite agreement as to the proper charges for this work was never reached.

6. The record shows that, due to claimant's failure to perform the assembling in a satisfactory manner, the expense of performing this informal agreement was too large. The Government should not, therefore, be held to pay the entire amount of this claim, but should be relieved of the costs growing out of claimant's inexperience.

DISPOSITION.

The Appeal Section, War Department Claims Board, will make and transmit to the Air Service Section, War Department Claims Board, a statement of the nature, terms, and conditions of the agreement and certificate C for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division, General Staff.

Lieut. Col. McKeeby and Capt. Morgan concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

JANUARY 28, 1921.

Case No. 3060.

In re **CLAIM OF BURKE & JAMES (INC.).**

UNCONSCIONABLE CONTRACT.—Where the evidence shows that a cost-plus contract is entered into based on estimated cost furnished by the contractor and investigation afterwards proves said cost exorbitant this Board will refuse to recommend any further or additional payment to claimant.

FRAUD.—Where the evidence establishes that the figures on which a contract is based were furnished by the claimant and afterwards proven to be grossly exorbitant the effect is the same as if the said estimate was fraudulently made and this Board will refuse to recommend any payment to the claimant.

BONUS.—Where the evidence establishes the fact that the claimant had a cost-plus contract providing for the payment to it of the cost of the articles contracted for plus fixed profit of \$173 each, and, in addition thereto, a certain percentage of all savings over and above the estimated cost price, and that claimant has been paid the cost of all cameras plus the unit profit of \$173 each, and that the estimated price was either grossly erroneous or fraudulently stated, this Board will refuse to recommend any further or additional payment to the claimant and will leave it to pursue any remedy it may have in the Court of Claims, where such matters are properly cognizable.

CLAIM AND DECISION.—Claim for \$47,172.37, and was originally filed before the Air Service Claims Board, which denied claimant relief, from which decision the claimant appealed to the Appeal Section, War Department Claims Board. Held, all relief will be denied.

Maj. Farr writing the opinion of the Board.

This case comes before the Appeal Section, War Department Claims Board on appeal from a decision of the Air Service Section, War Department Claims Board disallowing the payment of bonus voucher of Burke & James (Inc.), in the sum of \$47,172.37.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. On September 9, 1918, a formal contract, No. 4661, was entered into by and between Burke & James (Inc.), a corporation chartered under the State of Illinois, and the United States, by O. R. Ewing, captain, A. S. A. P., said contract being signed by H. Burke, secretary and treasurer of Burke & James (Inc.), for the claimant and O. R. Ewing, captain, A. S. A. P., on behalf of the United States,

said contract providing for the purchase, on a cost plus basis by the Government from the claimant, of 200 American model De Ram cameras.

2. Article V of the contract in question provides:

"ARTICLE V.—*Price*.—The price the Government will pay the contractor for the articles delivered to and accepted by the Government shall be the sum of the following items:

"(a) The actual cost of such articles.

"(b) A fixed profit of one hundred seventy-three dollars (\$173) on each article.

"(c) A bonus for savings effected in the cost of the articles equal to twenty-five per cent. of the difference between the actual cost of the articles accepted and their total estimated cost, to wit: \$1,590 each, but in making this computation, said total actual cost shall be increased by decreases therein due to changes in specifications and decreases by increases therein, due to changes in specifications, or to increases in the rates of wages under any act, determination, decision, or award of any Federal or State authority.

"(d) The Government furthermore agrees to reimburse the contractor, at the actual cost thereof, for the special tools, jigs, and dies, together with all engineering and installation expenses connected therewith, which are necessary for the proper fulfilment of this contract. Title to such tools, jigs, and dies shall vest in the Government when reimbursement for the same is made."

3. The claimant has completed and delivered to the Government the 200 American model De Ram cameras called for under the said contract and has been paid therefor the sum of \$127,931.76, which represents the cost of said cameras to the contractor and, in addition thereto, has been paid \$34,600, the fixed profit called for by said contract at the rate of \$173 for each camera delivered. It also appears that claimant has been overpaid in the sum of \$12,044.99, overpayment on overhead which it is now willing to allow as a set-off against its claim for \$47,172.37, thus reducing the amount of claim under the provisions of Article V, subsection (c) of said contract to \$35,127.38.

4. At the time of signing said contract, the estimated cost of each article to be delivered thereunder was \$1,590. Article V, subsection (c) provides—

"A bonus for savings effected in the cost of the articles equal to twenty-five per cent of the difference between the actual cost of the articles accepted and their total estimated cost, to wit: \$1,590 each * * *."

The actual cost as shown by the audit of the Government accountant is \$646.55 per camera, or a difference of \$943.45 between the actual cost and the estimated cost. This the claimant contends resulted in a saving to the Government of \$188,429.13, of which it is entitled to 25 per cent.

5. A hearing of this claim was had before the Air Service Section of the War Department Claims Board on August 9, 1920. No question has been raised as to the thoroughness or accuracy of the audit by the Government accountant which established the actual cost at \$646.55, and same is accepted by the claimant as true and correct.

6. The claimant, in addition to Contract No. 4661 had several other contracts or orders which were placed through the office of the chief of the Aerial Photographic Branch, Training Section, Military Aeronautics, in which office Mr. L. W. Miller was charged with the duty of passing upon the cost of the articles purchased by that section.

7. Mr. L. W. Miller prior to his employment by the Government, which began on or about January 1, 1918, had been employed since 1907 by Burke & James, manufacturers of photographic apparatus and equipment, 240 East Ontario Street, Chicago, Ill. Mr. Miller was dropped from the service of the Government December 15, 1918.

8. On October 2, 1918, a memorandum was submitted from First Lieut. P. Abrams, A. S. A., to Lieut. Col. Sullivan calling attention to apparent irregularities in the placing of purchase orders and, as a result of this and other complaints, a board of officers were appointed in the Bureau of Aircraft Production to investigate and report upon such charges as were preferred to it by the Division of Aircraft Production against civilian employees or former employees of said bureau and, in the event of any irregularities being found, to fix the responsibility therefor and make recommendations. It developed from the testimony taken before said board that Mr. L. W. Miller had been employed by Burke & James prior to the time of his entering Government service and that he went back into the service of the claimant company upon his release by the Government.

9. It further developed from said investigation that war order from the office of the Chief Signal Officer, Washington, D. C., No. 120334, dated September 14 calling for the delivery of 400 motion picture cameras had been placed with Burke & James (Inc.) at a unit price of \$823.36 per camera amounting to \$329,344 with certain extras added thereto, same amounting to \$54,028, or an aggregate of \$383,372.

10. The photographic officer, feeling that the above mentioned price was out of reason when quantity production was considered, reported the matter to Maj. Howard Elliott of the Finance Department, disbursing section who, in turn, dispatched an expert accountant to the office of Burke & James (Inc.) for the purpose of going over the production cost. This investigation resulted in a reduction in the price from \$824 each to approximately \$383 each.

11. It further developed that Burke & James (Inc.) had delivered to the Government films and photographic paper under Order No

360194 which turned out to be of an inferior grade and of no use to the Government.

12. Several references were made to various other transactions between claimant and the United States wherein it appears that an excessive price was charged by claimant for various commodities delivered by it.

13. The findings of the Board, together with its recommendations are as follows:

FINDINGS.

We, the Board, find that in the purchase of photographic supplies by the Bureau of Aircraft Production, such purchases were, in most instances, placed by said Mr. L. W. Miller; and the testimony shows that the placing of awards was not checked by any one having technical knowledge of photographic supplies.

We further find that in sending out bids for photographic supplies there were cases where important manufacturers were omitted and the time made so short that a decided advantage was given to Burke & James (Inc.), who were the only large photographic supply house having a representative in Washington.

We further find evidence of excessive prices being paid to Burke & James (Inc.), on certain awards, there being reason to believe that the orders could have been placed at much lower prices with other manufacturers, and that such fact was known or should have been known to Mr. L. W. Miller.

We further find that there has been delivered to the Government, and is now stored in Government warehouses, material delivered by Burke & James (Inc.), on orders awarded by Mr. L. W. Miller, which said material is defective and useless to the Government, and that Mr. L. W. Miller did know or should have known said material would prove to be useless to the Government.

We further find that Mr. L. W. Miller was in the employ of Burke & James (Inc.) between the years 1907-1914, and that immediately previous to his entering the employ of the Government he was manager of the New York office of Burke & James (Inc.).

RECOMMENDATIONS.

While the evidence obtained by this board does not disclose actual collusion or other criminal responsibility on the part of Mr. L. W. Miller with Burke & James (Inc.), it is far from being satisfied that such collusion or a conspiracy did not exist, and believes that its findings warrant the recommendation that the matter be turned over to the Department of Justice for thorough investigation.

DECISION.

1. The evidence presented to the Board fails to disclose whether or not Mr. L. W. Miller was a negotiating officer in entering into the contract in question, but the investigation of the Appeal Section does disclose that all transactions between the Government and the claim-

ant passing through the office of L. W. Miller will bear the closest scrutiny. If the evidence did establish that L. W. Miller had anything to do with negotiating the contract in question, the Board could dispose of this case in a few words. The evidence, however, does disclose the claimant company received order 120334, dated September 14, 1918, for 400 motion-picture machines that was subsequently amended by order No. 43247 to 50 machines, and that in the subsequent order the price was reduced from \$823.36 to \$383 a machine, thereby resulting in a saving to the Government of approximately \$440 a machine on 50 machines, or an aggregate sum of \$22,000, and that this reduction was only made after the Government had sent an expert accountant to the plant of Burke & James, and that the preliminary negotiations involved in the original order of September 14, 1918, showed that the claimant had charged the Government an unconscionable price, and that after this investigation by the Government the reduction in price aggregated over 100 per cent.

2. Various complaints having been made as to certain other contracts that were entered into between claimant and the United States Government, a board of officers was convened in the Bureau of Aircraft Production for the purpose of investigating the said complaints. The evidence there taken conclusively establishes the fact that numerous orders and contracts were given the claimant at prices that were in excess of bids of other concerns, and that, in addition thereto, under contract 360194 the claimant had delivered to the Government goods of such inferior quality that the same were of no use, so that it may be that the United States will have a counter claim against the claimant by reason of the delivery of the said goods under order No. 360194.

3. The claimant has been paid the full sum of \$127,931.76, the cost of the cameras in question, and in addition thereto the sum of \$34,600 as a fixed profit of \$173 for each delivered. The record also discloses the fact that due to an error the claimant has received an overpayment of \$12,044.95 and is now attempting to collect \$35,127.38, the same being the bonus of \$47,172.37 less the aforesaid overpayment of \$12,044.95. If claimant is allowed to recover this sum it will have received a profit of \$81,772.37 on an expenditure of \$127,931.76, or approximately a profit of 64 per cent (63.9187 per cent).

4. The question presented for decision to this Board is whether or not a review of all the facts and circumstances surrounding not only the contract in question, but the claimant's various dealings with the Government throughout the war, should be considered, and whether or not the contract dated September 9, 1918, No. 4661, is unconscionable to such an extent that the Secretary of War should refuse to

make any further payments to claimant under any of the terms of the same. Shelly, Law of Government Contracts, page 4, says:

"As between man and man, when dealing under ordinary conditions, fraud must be affirmatively proven if a contract is to be set aside. But the work is different when the dominion of Government contracts is entered, since in one noted case in which the Government could not affirmatively show fraud to exist, a recovery was denied claimant when it was shown the Government had paid many times the market value of the article, the unconscionable price supplying the place of positive evidence of fraud. (*Hume & Hume v. U. S.*, 132 U. S., 406.)

5. The figures of \$1,590, the estimated cost price of the cameras in question, in view of the later development showing the actual cost to be only \$646.55, is evidence that the said estimated cost of \$1,590 is either based on a gross mistake, or the cost price was stated in this sum for the purpose of taking advantage of the Government and thereby increasing the profit of the contractor.

6. The evidence in the instant case shows only fraud in so far as the estimated price of \$1,590 is unconscionable. When a contractor comes before the Secretary of War asking for an adjustment, the Secretary, being only an administrative officer and not having the powers and authorities of a court, in any case in which it appears that advantage has perhaps been taken of the War Department by the contractor whether maliciously or innocently, can refuse to take jurisdiction for the purpose of deciding on its merits any such case presented. In the instant case, taking into consideration all the facts and the various investigations in the War Department as to previous or prior transactions of the claimant, and considering the great discrepancy in the estimated cost of the cameras on which the contract in question is based and the actual cost, this Board, acting for the Secretary of War, refuses to take jurisdiction for the purpose of deciding on its merits and leaves the claimant, if it is so advised, to pursue whatever remedies it may have in the Court of Claims, where such matters are properly cognizable and where the machinery is sufficient, to enforce any decree that might be granted versus the claimant, and where any set off that the War Department may have can be properly pleaded and taken advantage of for the benefit of the Government.

7. For the foregoing reasons all relief asked for by the claimant is denied.

DISPOSITION.

A final order denying relief will issue.

Lieut. Col. McKeeby and Capt. Sheppard concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

JANUARY 29, 1921.

Case No. 3040.

In re **CLAIM OF DALE MACHINERY CO.**

- 1. LIQUIDATED DAMAGES.**—Where formal contract provides for liquidated damages for delay in delivery of the articles contracted for, but provides that delays due to “labor strikes in the works of the contractor” are to be considered as due to unavoidable causes, and a strike occurs in a plant of the subcontractor, the prime contractor can not take advantage of such strike as an excuse for failure to deliver the article contracted for on time. Held, claimant not entitled to remission of the liquidated damages which were deducted from the contract price.

Capt. Taylor writing the opinion of the Board.

This case arises under G. O. 103, War Department, 1918. It is presented to the Appeal Section for settlement of a dispute arising between the contractor and the Chief of Ordnance in re the deduction of liquidated damages under a formal contract.

FINDINGS OF FACT.

1. By a formal contract bearing date June 7, 1919, the Dale-Brewster Machinery Co. (Inc.), undertook to deliver to the commanding officer, Watertown Arsenal, Watertown, Mass., one “Wickes Bros. No. 676, 48-inch single end vertical punching and shearing machine” (fully described in the contract), within 60 days from date upon which final signature was affixed to said contract. The price to be paid for the machine in event of prompt delivery was \$3,512.

2. Article 7 of the contract provides as follows:

“In the event of the failure of the contractor to deliver any or all of the material contracted for by the date stipulated in article 1 of this contract * * * the contracting officer, or his successor, may waive the time limit and the contractor shall complete the delivery within a reasonable time, and there will be deducted as liquidated damages from any payment to be made thereafter 1/15 of one (1) per cent of the contract price of any material delivered thereafter for each and every day of delay in its delivery beyond the date stipulated in this contract for completion of the final delivery * * *.”

“In making settlements in which such charges are involved, the contractor shall receive credit for all delays which the contracting officer, or his successor, may determine to have been due to action of the United States, and for such other delays as the same authority may decide to have been due to such unavoidable causes, including

fires, unseasonably severe storms, and *labor strikes in the works of the contractor*, as occurred before the date upon which final delivery is due under the provisions of article 1 * * *."

3. It appears from the record that the Dale-Brewster Machinery Co. (Inc.), had a sales agency agreement with Wickes Bros., Saginaw, Mich., the manufacturers of the machine covered by the above-mentioned contract, whereby said Dale-Brewster Co. were given the exclusive right to sell the products of Wickes Bros. in certain territory including that in which the contract was made. On or about June 13, 1919, an order for the machine was placed by claimants with Wickes Bros. On June 30, 1919, a strike was declared by the machinists and helpers at the plant of Wickes Bros., which was called off on or about the 9th of September. Shipment of the punching and shearing machine was made on or about October 28, 1919.

4. The disbursing officer at Watertown Arsenal deducted from payment to the contractor for the machine the sum of \$170.92 as liquidated damages for the failure of the company to make delivery within the time specified in the contract. To this action the Dale-Brewster Co. took exception, and appealed the matter to the Chief of Ordnance. The Ordnance Section, War Department Claims Board, acting for the Chief of Ordnance, sustained the ruling of the commanding officer, Watertown Arsenal. The claimant thereupon addressed a communication to the Secretary of War, by whom the claim was referred to the Appeal Section for disposition under G. O. 103, as a dispute between the contractor and the Chief of Ordnance.

DECISION.

1. Under the facts set out above, the action of the contracting officer in deducting the liquidated damages was proper, and must be sustained.

2. The contention of the claimant is sufficiently set forth in the following paragraph from a letter addressed to the Secretary of War under date of November 9, 1920:

"2. The Dale-Brewster Machinery Company contends that liquidated damages should not have been assessed in this case, as delays in delivery were due to strikes occurring in the plant of Wickes Bros. This contention is based upon the theory that the plant of Wickes Bros. was in effect the plant of the prime contractor in view of a sales agency agreement by which the Dale-Brewster Machinery Company has the exclusive right to sell machine tools manufactured by Wickes Bros."

3. Claimant company also files a copy of the sales agency agreement mentioned above. That agreement fails to sustain the contention of claimant company. Its nature and terms clearly dif-

ferentiate the identity of Dale-Brewster Machinery Co. and Wickes Bros., and shows conclusively that the claimant company had no interest at all in the factory. It discloses rather the fact that the sole relation existing between the two was that of a merchant and the manufacturer from whom he obtained his goods.

4. Claimant further states in a letter to the commanding officer, Watertown Arsenal, under date of February 10, 1920:

"We respectfully call your attention to our proposal of May 27, in which we specifically state—

" 'This contract is subject to strikes, lockouts, transportation delays, requisition or impressment of merchandise of plant by the U. S. Government, and other causes beyond our control. Prices subject to change without notice. Orders given to this company are not subject to postponement or cancellation for any reason, unless we so agree in writing.' "

Claimant contends that this paragraph in its original proposal is sufficient to relieve it from responsibility. This Board has obtained from the Watertown Arsenal copies of the original "Circular Advertisement and Proposal" of May 14, 1919, and claimant's letter of proposal of May 27, 1919, in neither of which does the clause quoted above appear. However, assuming that such a paragraph did appear in claimant's proposal, this Board does not deem that fact sufficient to relieve the claimant. That proposal was followed by a formal contract, and the preliminary negotiations must be deemed to have been merged therein. This principle is too well recognized to need further discussion.

5. Had the Dale-Brewster Machinery Co. seen fit to protect itself against the result of strikes in the plant of Wickes Bros., it could have done so by giving the manufacturer notice under paragraph 9 of the sales agreement which provides:

"Paragraph 9. The manufacturer or the merchant shall not under any circumstances be liable for damage due to delay in shipment or cancellations caused by fires, strikes, war, or acts of Providence. This clause does not apply to relieve the manufacturer from responsibility to the merchant where the merchant was subject to a contingent penalty, which was made known to the manufacturer when it was called upon to make delivery date."

With the question as to whether the contractor did or did not so advise the manufacturer, the Government of course is not concerned.

6. If on the other hand the contractor desired to protect itself from the effects of a strike, in a plant not its own, it was incumbent upon the company to see to it that such a clause was inserted in the contract. The contract under consideration was a formal one, and its language is not susceptible of the construction which claimant desires to place upon it.

7. For the reasons assigned above, it is the decision of this Board that relief must be denied.

DISPOSITION.

The Appeal Section will enter a final order denying relief.

Lieut. Col. McKeeby and Capt. Woodfin concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

FEBRUARY 18, 1921.

Case No. 3040.

In re **CLAIM OF THE DALE MACHINERY CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

The records of the Appeal Section, War Department Claims Board, do not show that this case was ever formally appealed to the Secretary of War. However, on February 18, 1921, the following document and order of the Secretary of War was received and is published in connection with said case. (For decision of Appeal Section of Jan. 29, 1921, see Vol. VIII, these decisions, p. 529.

The controlling question on this appeal is the force to be given to a clause relating to labor strikes in the contract between the United States and the Dale-Brewster Machinery Co.

By the contract referred to, dated June 7, 1919, the machinery company undertook to deliver to the commanding officer Watertown Arsenal, Watertown, Mass., one "Wickes Bros. No. 676-48" single end vertical punching machine, within 60 days from date of final signature. The price to be paid for the machine was \$3,512, one-fifteenth of 1 per cent to be deducted for each day's delay beyond date of delivery fixed in the contract. No deduction was to be made for delays "due to such unavoidable causes, including fires, unreasonably severe storms, and *labor strikes in the works of the contractor.*" The Dale-Brewster Machinery Co. had no factory of its own, or works of any kind for the manufacture of the machine in question, but was acting as exclusive agent for Wickes Bros., of Saginaw, Mich. This was known to the Government as well as the fact that the machine was to be made at the Wickes Bros. factory. Its name would probably have indicated that fact even if not previously known.

June 13, 1919, the order was duly placed with Wickes Bros. by the Dale-Brewster Co. for the manufacture of the machine. June 30, 1919, a strike was declared in Wickes Bros. plant, which shut down the works until September 9, 1919. Shipment of the machine was made October 28, 1919.

The disbursing officer at the Watertown Arsenal deducted \$170.92 as liquidated damages for delay in delivery, all of which was due to the strike. The Appeal Section of the War Department Claims Board has held that such deduction was correct and the case comes before me on appeal from such action.

I can not concur in the opinion of the Appeal Section. The clause in question was written in the contract by the Government with knowledge of the facts as before stated. The parties must have contemplated that the strike, if any, should occur, which would prevent the fulfillment of the contract on time, must occur in the works of Wickes Bros., not of the Dale-Brewster Co. Otherwise the clause was a nullity and its insertion futile, because it was well known to both parties that the Dale-Brewster Co. had no works. In my opinion this clause should be given full force and effect and no deduction made on account of the strike referred to. The decision of the Appeal Section is set aside and vacated. A voucher for the sum in question should be prepared and submitted to the accounting officers of the Treasury for their action.

NEWTON D. BAKER,
Secretary of War.

JANUARY 29, 1921.

Case No. 3035.

In re **CLAIM OF HOLT MANUFACTURING CO.**

1. CLAIM AND DECISION.—Claim under the act of March 2, 1919, for \$34,212.35.

An agreement is found whereby claimant is entitled to payment for the cost of erecting a building for instruction purposes, for services of instructors and stenographers, for supplies and equipment furnished upon request of certain officers, and for payment of rent of a house used as the headquarters office, all in connection with a school established for the training of officers and enlisted men in the maintenance of motor equipment at claimant's Peoria plant. Claimant is not entitled to reimbursement of expenses in moving and altering houses for rental as quarters to officers. (See Vol. III, p. 412.)

Maj. Hill writing the opinion of the Board.

This is a claim under the act of March 2, 1919. Statement of claim, Form B, was filed November 22, 1920, for \$34,212.35, by reason of an agreement alleged to have been made between claimant and the Ordnance Department for services and supplies furnished in maintaining a school for the instruction of officers and enlisted men in the maintenance of motor equipment. The claim was originally presented to the Ordnance Department in June, 1919.

FINDINGS OF FACT.

1. Early in July, 1917, Maj. Lucian B. Moody, Ordnance Department, in charge of the motor equipment section of the Ordnance Department, conferred with claimant's Mr. M. M. Baker, to ascertain whether claimant would undertake the establishment of a school for the instruction of officers and enlisted men in the maintenance of motor equipment.

2. Under date of July 19, 1917, the following letter was written to claimant by Maj. Moody:

“1. Replying to your letter of June 22 regarding instructions for officers and enlisted men of this department, I am directed by the Chief of Ordnance to inform you that we will send a class of ten officers to receive instruction at your plant for approximately thirty days, beginning September 10. Capt. H. T. Herring, O. O. R. C. will have charge of this class and will cooperate with your instructors in

this work. Any arrangements you make with Capt. Herring will be satisfactory to this office.

"2. It is the desire of this department to have this class given the most complete instruction possible so that after finishing your course they will be able to meet all the problems of the truck in the field, and we trust that your course of instruction will be based on this fact.

"3. Capt. Herring has been instructed to confer with you with a view to establishing such a course."

3. In August, 1917, Capt. Herring proceeded to Peoria and made arrangements to establish the school during the month of October, 1917. The school actually commenced operation on October 23, 1917. Tractor instruction was discontinued at Peoria in July, 1918, but the welding school was continued there. The school was demobilized in December, 1918.

4. At his first conference with Mr. Baker, Capt. Herring stated that it would be better if some facilities were provided so that officers attending the school could live near their work rather than 2 miles away in Peoria. Mr. Baker stated that claimant contemplated the purchase of additional land near the plant upon which were a number of small houses. It was suggested that these could be relocated and altered so as to place them in a livable condition. It was understood between Mr. Baker and Capt. Herring that the Holt Co. would put these houses in a livable condition, and that Capt. Herring would require all officers to live in these houses, each to pay rent at the rate of \$10 a month. It was understood that these arrangements were made by Capt. Herring as representing the officers rather than the United States, and that the Holt Co. was to look for reimbursement to the officers who would be required to occupy these houses. Claimant has credited against the expense of moving and of repairs to these buildings the amount of rent received. Claimant states that it would have been largely reimbursed for these expenditures if the main portion of the school had not been moved to Raritan Arsenal in July, 1918, whereas it had been represented that it was the intention of the Government that the school would be maintained so long as such instruction was required during the war.

5. One of the houses so provided was used exclusively for office purposes, the first floor for the commanding officer and the second for the medical department. This was the two-story house on the extreme southwest corner of the property facing the small street which intersected the main street running by the Holt plant on which the car line is situated at right angles.

6. Instruction was first given by having the students circulate through the Holt plant. This appeared to be not the best method, and Capt. Herring asked Mr. Baker if the company had a building

which could be used purely for instruction purposes. The Holt Co. had no such building available. Capt Herring testified:

"I recall several discussions of this, and I do not know exactly how Mr. Baker arrived at the decision to build a building, but he finally told me that he had decided to build a building which we could use for instruction purposes, and this was done, and that building is referred to as Caterpillar Hall. * * * There was no definite agreement on my part, and so far as I know on no other Government employee's part to see that the Holt Co. was paid for the construction of the building, though, as stated in my other testimony, it was always generally understood on the part of myself and the Holt plant that they were entitled to reasonable remuneration for whatever expenditures they made toward assisting the Government in school work."

This building was used exclusively by the school for instruction purposes.

7. The balance of the claim is for salaries paid by claimant to instructors and stenographers engaged exclusively in school work and for supplies and equipment furnished by it to the school. Capt. Herring testified that he requested the Holt Co. to furnish the services of civilian instructors approved by him, to furnish the necessary stenographic service and to furnish supplies and equipment which could not be secured through routine Government channels, and that he stated that the Holt Co. would be reimbursed by the Government for such expenditures for services, supplies, and equipment as were properly ordered through his office, but without profit to the Holt Co. These services, supplies, and equipment were covered by requisitions signed either by Capt. Herring, Capt. J. R. Kimball, or First Lieut. E. S. White, or by bills for the same, approved by one of these officers. Among these supplies was a quantity of medical supplies procured locally by Capt. Herring, when it was impossible to secure such supplies for immediate use through regular military channels. At Capt. Herring's request, bills for these medical supplies as approved by him were paid by the Holt Co. upon his statement that the Holt Co. would be reimbursed by the Government as for other services and supplies furnished. Claimant's Mr. Gotshall testified that an audit of requisitions and bills on all items of supplies and services had been made by Mr. H. B. McKinley, a Government accountant in charge at the plant, and that the result of this audit though not entirely satisfactory was acceptable to the claimant.

8. Under date of February 11, 1919, the Ordnance Department issued to claimant a procurement order, War Ord. No. 20013-MT6009, in part as follows:

"*Services and materials.*—Services of your instructors and material furnished by you in maintenance of 'Ordnance Motor Instructions School' at your plant, Peoria, Ill. (now known as 'Ordnance

Maintenance and Repair Schools' in the name of the United States for maintenance and repair of motor vehicles).

"*Price.*—Total amount hereunder is eleven thousand eight hundred thirty-two dollars and fifteen cents (\$11,832.15). Payment by the United States will be made through the District Ordnance Office, Chicago, Ill.

"*Time of performance and delivery.*—Starting September 29, 1917, and completing on or before June 22, 1918."

9. Based upon this order the Ordnance Section issued its certificate Form C dated July 8, 1919. Claimant at first refused to accept an award for \$11,832.15, stating that it declined to accept that sum in full settlement as its claim was for a larger amount. Claimant, however, on October 11, 1920, accepted the award after receiving assurance in writing from the Ordnance Section that it could present a class B claim for the difference between the amount of the award and the amount actually spent. After acceptance by claimant, the award was held in the files of the Ordnance Section. It was never forwarded to the War Department Claims Board for approval nor has any payment been made under the award.

DECISION.

1. It appears clear that there was no agreement obligating the United States to reimburse claimant for its expense in moving and altering the houses for use as quarters for the officers at the school. The arrangements made contemplated reimbursement for that expense in the form of rents to be paid by the officers during their attendance at the school. Claimant failed of complete reimbursement because of the discontinuance of the school at Peoria when it was removed to Raritan Arsenal and consolidated with other similar schools. While it is true that it was believed that the school would be maintained at Peoria as long as such training was needed, there was certainly no agreement to that effect. Claimant is not entitled to reimbursement for its expense in connection with these houses used as quarters.

2. As to the house which was used exclusively for office purposes the situation is different. This house was used as an office for the commanding officer and for a medical department exclusively for the benefit of the United States. It is our opinion that an implied agreement arose out of such use and that the United States is obligated to pay to claimant a reasonable rental for the period for which it was so used.

3. It is our opinion that the claimant built Caterpillar Hall at the request of Capt. Herring for the use of the school for instruction purposes and that claimant should be paid therefor the reasonable cost but without profit and less its salvage value.

4. Claimant furnished the services of instructors and stenographers, various supplies, and equipment for the school upon the request of Capt. Herring. The United States is obligated to pay the reasonable cost to claimant of such services, supplies, and equipment, but without profit, as were furnished upon requisitions signed by Capt. Herring, Capt. J. R. Kimball, or First Lieut. E. S. White, or for which bills were approved by either of these officers.

DISPOSITION.

The Appeal Section transmits its decision to the Ordnance Section for appropriate action.

Lieut. Col. McKeeby and Lieut. Tabb concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

JANUARY 29, 1921.

Case No. 3015.

In re CLAIM OF J. E. LYONS.

1. MEASURE OF DAMAGES UPON TERMINATION OF PURCHASE ORDER.—

Where a formal purchase order for a 500-ton barge which contains a termination clause is terminated, the measure of damages is the difference between the contract price and the fair market value of the barge at the time the purchase order was terminated.

2. JURISDICTION OF THE SECRETARY OF WAR.—The Secretary of War has no jurisdiction to adjust a claim based upon an informal agreement when no expenditures have been made or obligations incurred upon the faith of same.

3. CLAIM AND DECISION.—Held, as to item A, claimant is entitled to relief to the extent noted in "1," above. As to items B and C, relief is denied for the reasons stated in "2," above.

Capt. Taylor writing the opinion of the Board.

FINDINGS OF FACTS.

The Board finds the following to be the facts:

1. This claim is before the Appeal Section on appeal by claimant from the action of the Ordnance Section. The Ordnance Section made an award of \$2,000 on item "A" of the claim and disallowed items "B" and "C."

Item "A" of the claim is based upon the cancellation by the United States of a purchase order which is within the exceptions to section 3744, Revised Statutes, and this item, therefore, is to be considered as coming before this section on appeal under General Orders 103, War Department, 1918.

Items "B" and "C" should be designated as items of a class B claim within the purview of the act of March 2, 1919.

2. *Item A—Loss on cancellation of purchase order for 500-ton barge.*—This item is for loss arising out of the cancellation by the United States of Purchase Order No. 4845 dated May 16, 1918, issued by Thompson-Starrett Co., agent for the United States, in the construction of explosives plant "C" at Nitro, W. Va. The purchase order was signed by R. H. Williams, deputy director of purchases. The order calls for "one 500-ton barge now located at Rockport, Ind.," and "one 800-ton barge now located at Cairo, Ill.,"; price

\$17,100; time of shipment, "at once" (rush); delivery point, f. o. b. Cincinnati, Ohio.

The 800-ton barge was delivered and accepted and the contractor was paid the contract price, \$11,100. The 500-ton barge had been carried down the river and grounded on a sand bar and could not be refloated until the river rose and covered the bar. This fact was known to Mr. Williams at the time the purchase was negotiated. The boat was finally launched and towed to Cincinnati, reaching there about December 4, 1918. A cancellation notice, dated December 3, 1918, was mailed to the contractor, but he was away from home at the time and did not get the notice until his return about December 20, 1918. In the meantime he had notified Mr. Williams that the barge was at Cincinnati ready for delivery.

Upon receipt of the cancellation notice Mr. Lyons went to Nitro and had an interview with Mr. Williams relative to the cancellation, and Mr. Williams advised Mr. Lyons to submit in writing a proposal relative thereto. Accordingly, on December 23, 1918, Mr. Lyons wrote Mr. Williams stating, in substance, that he preferred that the Government take the barge at the contract price, \$6,000, "but if the Government would rather pay me \$2,000 bonus for my trouble and expense and me keep the boat, I am willing to do this." Shortly thereafter Mr. Lyons had the boat towed to Middleport, Ohio, at a cost of \$75, and held it until July 5, 1920, when he sold it for \$4,000, out of which sum he paid a brokerage commission of \$125.

The claim on this item is for \$2,000, which represents the depreciation in the value of the barge, plus the towing charges to Middleport, plus holding charge of \$1.50 per day from December 4, 1918, to July 4, 1920, plus the cost of ropes, lines, etc., amounting to \$1,161.50, which, added to the \$2,000 loss, makes the total amount of this item \$3,161.50.

Mr. Lyons admits that he made no effort to sell the barge until after April, 1920. During this time the boat was cared for by Mr. Lyons's son, who was in Mr. Lyons's employ. The time required for the care of the boat averaged about two and one-half hours per day.

3. *Item B—The boat-yard transaction.*—Mr. Lyons owned a boat yard at Higginsport, Ohio. This yard consisted of a frame building, some machinery, lumber, oakum, cotton, bolts, irons, spikes, etc., for use in the construction and repair of boats and barges. Previous to the date of the purchase order above referred to Mr. Lyons had sold to the United States for use at Nitro his river fleet consisting of 1 steamboat and 11 barges. The two boats covered by the above purchase order constituted the last of his fleet. Having disposed of all of his boats and barges, he was anxious to also dispose of his boat yard and material. He therefore proposed to Mr. Wil-

liams to sell him this boat yard and material. Mr. Williams had replied that the boat yard and material would be required in the operation of the fleet at Nitro. Mr. Williams went to Higginsport and inspected the boat yard with a view to its purchase. He testified that he told Mr. Lyons in August, 1918, that he would take all of the lumber at the boat yard. There were two classes of lumber, (1) "long western," intended for gunwales, which Mr. Williams agreed to take at \$100 per M feet; (2) "native white pine," which Mr. Williams agreed to take at \$80 per M feet. Mr. Williams testified that Mr. Lyons agreed to this, and that both considered the transaction closed with reference to the lumber, except as to the amount, which was to be determined by an inventory. The other articles were also to be inventoried and appraised. Two men from the office of Thompson-Starrett Co. at Nitro were sent to Higginsport to make an inventory and appraisal of all of the property at the boat yard. They did so, but no final agreement was ever reached between Mr. Williams and Mr. Lyons relative to the price of any of the material except the lumber as above stated. Undoubtedly all of the material would have been purchased by Mr. Williams if he and Mr. Lyons had reached an agreement as to the prices of the various articles, but this was never done. None of the lumber was delivered to any agent of the Government. No purchase order covering it or any of the other material was ever issued. The inventory above referred to was lost in the fire which destroyed the administrative building at Nitro.

4. Mr. Lyons testified that in August, 1918, he had an opportunity to sell the boat yard and material to some private parties, and that he called Mr. Williams over the phone and advised him of this fact, and that Mr. Williams replied advising him not to sell to the private parties, as the boat yard and material would be needed by the Government. Mr. Williams says this referred only to the lumber.

5. Mr. Lyons has been unable to dispose of the boat yard and material, but he did build two barges out of the material which was at the boat yard, and has sold them for \$7,500 each. The remainder of the material is still at the yard, according to Mr. Lyons's testimony.

At the time of his negotiations with Mr. Williams, Mr. Lyons estimated the value of his boat yard and material at between \$35,000 and \$40,000. The value now placed on it as of that date is \$43,350.20, and the value recovered and still recoverable is placed at \$18,280, making the loss or depreciation \$25,070.20.

6. Mr. Williams testified that he was not only acting as purchasing agent for Thompson-Starrett Co., which company was agent for the United States in the construction of the plant at Nitro, but that he was also acting as purchasing agent for the Hercules Powder Co., which latter company was under contract with the United States to

operate the plant at Nitro. By the terms of the Ordnance Contract No. P8729-930E, dated May 9, 1918, the Hercules Powder Co. was to operate the plant at Nitro at cost, plus a fixed profit of 2½ cents per pound on the powder manufactured, accepted, and delivered to the United States. Mr. Williams testified that if the boat yard and material in question had been purchased it would have been for the Hercules Powder Co. Mr. Lyons did not know that Mr. Williams was representing the Hercules Powder Co. in this matter, but thought he was the representative of Thompson-Starrett Co., agent for the United States. In all of his previous negotiations with Mr. Lyons Mr. Williams had acted in this latter capacity.

7. *Item C—Loss based on the Liberty bond transaction.*—Maj. W. M. Wood, Q. M. C., the constructing quartermaster at Nitro, was chairman of the fourth Liberty loan committee at that place. On October 7, 1918, Mr. Lyons subscribed for \$2,000 of the fourth Liberty loan issue with Maj. Wood, and gave him his check for \$2,000, dated October 7, 1918, in full payment of the subscription. Maj. Wood entered this subscription for Mr. Lyons through the Citizens' Bank at Nitro. Maj. Wood signed Mr. Lyons's name to the subscription, it being No. 255, dated October 12, 1918. The bank issued its receipt, and this and a duplicate of the subscription were sent to Mr. Lyons.

8. Shortly after the transaction above mentioned Mr. Lyons informed Maj. Wood that he was negotiating with Mr. Williams for the sale to the latter of the boat yard and material at Higginsport, and stated that if the deal went through he would subscribe for \$20,000 additional fourth Liberty loan bonds. Maj. Wood advised Mr. Lyons that he had better subscribe for the bonds at once, as it might be too late to do so if he waited until the boat yard deal was closed. Mr. Lyons accordingly gave Maj. Wood his check for \$2,000 as the initial 10 per cent payment on a \$20,000 subscription and told Maj. Wood to enter his subscription for \$20,000 of the bonds. This check was dated October 16, 1918. Maj. Wood signed Mr. Lyons's name to the subscription for \$20,000 of the fourth Liberty loan bonds and delivered it and the check to the Citizens' Bank of Nitro. The subscription is dated October 19, 1918, being No. 8211. The bank issued its receipt for this payment, and Maj. Wood delivered this receipt and duplicate of the subscription to Mr. Lyons.

9. As the sale of the boat yard did not materialize Mr. Lyons failed to make payment of the deferred installments on this \$20,000 subscription as required by the Treasury Department circulars relating to this bond issue, and when Mr. Lyons finally went to the bank some time in 1919 to see about his bonds he was advised that the \$20,000 in bonds covered by the second subscription had been sold at the market price and had brought \$18,200, which represented

a loss of \$1,800. The bank then tendered Mr. Lyons \$200 in bonds, the balance remaining after deducting the \$1,800 depreciation from the \$2,000, or 10 per cent payment on the second subscription, and also tendered him \$2,000 in bonds on the first subscription, which had been fully paid at the time the subscription was made. In what may be termed a spirit of childish petulance, Mr. Lyons refused to take any of the bonds tendered by the bank. He now says he has since requested the bank to deliver the \$2,000 in bonds which represented his first subscription and which was fully paid for, and also \$2,000 in bonds which the second \$2,000 or 10 per cent payment represents, and the bank has refused to comply with this request.

10. The proposed sale of the boat yard had nothing to do with the first subscription of \$2,000 of Liberty bonds, yet Mr. Lyons is now seeking to have the United States reimburse him this \$2,000, and interest from date of the subscription, because he did not take the bonds when they were tendered to him by the bank. He is also asking that the United States reimburse him \$2,000 and interest from date of the 10 per cent payment of the \$20,000 bond subscription. This claim is on the theory that this subscription was conditional on the consummation of the sale of the boat yard, and as the United States failed to take the boat yard he should be reimbursed the amount paid on this subscription, with interest.

Mr. Williams had nothing to do with the Liberty loan bond subscriptions and did not know that the \$20,000 subscription was conditional on the sale of the boat yard.

DECISION.

1. *Item A—Loss on cancellation of the purchase order for 500-ton barge.*—The Government elected to cancel the purchase order covering the 500-ton barge which was to have been delivered to the Government at Cincinnati. It was at Cincinnati ready for delivery when the order was canceled. The measure of damage to the contractor upon cancellation of the purchase order by the Government is the difference between the contract price, \$6,000, and the fair market value of the barge at Cincinnati at the time of cancellation. Mr. Lyons admits that the fair market value of the barge at the time of cancellation was \$4,000. At that time he offered to accept \$2,000 in full satisfaction of damages for cancellation of the purchase order. He is not entitled to recover anything for expenditures incurred by him in having the barge towed to Middleport, or for the holding charges incurred from December 4, 1918, to July 4, 1920. By the act of taking possession of the barge at Cincinnati, he elected to accept cancellation of the purchase order and any expenditures incurred by him in connection with the barge after that date can not

be charged against the United States. It was his property and he was at liberty to keep it, sell it, or make such disposition of it as he saw fit. The award of the Ordnance Section of \$2,000 as compensation for the cancellation of the purchase order is therefore approved.

2. *Item B—The boat-yard transaction.*—The testimony of Mr. Lyons to the effect that an agreement was entered into with Mr. Williams for the sale of the lumber at the boat yard is corroborated by Mr. Williams. However, the evidence does not establish that an agreement was entered into with reference to the balance of the material at the boat yard. It is probably true that Mr. Lyons could have sold the boat yard and material to other parties at that time but refrained from doing so because he expected to close the transaction with Mr. Williams. It is also probably true that the value of this property has since depreciated and that Mr. Lyons has sustained a loss by reason of not having disposed of it when he had an opportunity to do so.

The act of March 2, 1919, authorizes the Secretary of War—

“to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis that has been entered into in good faith during the present emergency and prior to November twelfth, nineteen hundred and eighteen, by any officer or agent acting under his authority, direction, or instruction, or that of the President, with any person, firm, or corporation * * * or for the production, manufacture, sale, acquisition, or control of equipment, materials, or supplies, or for services, or for facilities, or other purposes connected with the prosecution of the war, when such agreement has been performed in whole or in part, *or expenditures have been made or obligations incurred upon the faith of the same* by any person, firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law.”

In order for the Secretary of War to have jurisdiction of a claim based on an informal agreement, one of the conditions is that expenditures must have been made or obligations incurred upon the faith of the alleged agreement. In this case it can not be said that Mr. Lyons made any expenditures or incurred any obligations upon the faith of his negotiations with Mr. Williams. All expenditures made by him on the boat yard and material had been made prior to the time he entered into negotiations with Mr. Williams for the sale of this material. Consequently, although a verbal agreement was entered into between the parties relative to the lumber, yet it is not such an agreement as the act of March 2, 1919, authorizes the Secretary of War to adjust, pay, or discharge. There is no authority vested in the Secretary of War outside of that conferred upon him by the above-mentioned act by which he could adjust, pay, or discharge this item of the claim.

For the reasons stated, therefore, relief as to this item of the claim is hereby denied.

3. *Item C—Loss on Liberty loan bond subscriptions.*—With reference to the first subscription of \$2,000 of bonds, which was paid for in full at the time the subscription was entered, this item of the claim is absurd. It was not in any way connected with the second subscription, which was for \$20,000, nor was it in any way conditioned upon the sale of the boatyard and material. Furthermore, it is not a matter over which the Secretary of War has jurisdiction. It was a transaction with the bank, Maj. Wood acting as agent for claimant. This item of the claim is, therefore, disallowed.

4. With reference to the claim for loss on the second bond subscription, which was for \$20,000, and on which a cash payment of \$2,000, or 10 per cent, was paid at the time the subscription was entered, the Appeal Section holds that the Secretary of War has no jurisdiction regarding this item of the claim. The subscription was made with Maj. W. M. Wood, Q. M. C., who was chairman of the Liberty loan committee at Nitro. In his capacity as chairman of the committee, Maj. Wood was not acting as a representative or agent of the Secretary of War, but in the capacity of a private citizen. The fact that he was a commissioned officer was a mere coincidence. The fact that claimant did not meet the deferred payments on this subscription because the sale of the boatyard and material was not consummated, and that he thereby suffered a loss, can not be held to be a direct consequence of the failure of the Government to purchase the boatyard and material, or even the lumber.

For the reasons stated, therefore, this item of the claim is hereby denied.

DISPOSITION.

1. With reference to item A of this claim, the Appeal Section hereby transmits its decision to the Ordnance Section for appropriate action.

2. With reference to items "B" and "C" of the claim, the Appeal Section will enter a formal order denying relief.

Lieut. Col. McKeeby and Capt. Woodfin concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

JANUARY 29, 1921.

Case No. 3038.

In re **CLAIM OF THE MARYLAND STATE FAIR (INC.).**

- 1. USING PRIVATE PROPERTY BY GOVERNMENT TROOPS.**—Where United States troops take possession of private property, and during the occupancy of same damage and destruction is occasioned by the troops, the owner of the property is entitled to reimbursement for the amount of the actual damages sustained.
- 2. MEASURE OF DAMAGES.**—In estimating the measure of damages in such circumstances as stated in paragraph 1 a safe rule to follow, as prescribed in G. O. 39, W. D., 1918, and G. O. 37, W. D., 1920, is to determine the cost of restoration of the premises and deduct therefrom a certain sum as representing the excess value of the restored property over the value of the property which was damaged or destroyed.
- 3. CLAIM AND DECISION.**—This is an appeal from the disallowance of a number of items by the Appraisal Section in an award issued by that section. The separate items are discussed and the action of the Appraisal Section modified in accordance with the testimony offered at the hearing before the Appeal Section.

Maj. Blackburn writing the opinion of the Board.

FINDINGS OF FACT.

1. This case comes to the Appeal Section, War Department Claims Board, on appeal from the decision of the Appraisal Section, awarding claimant \$18,918.06 on a claim as amended for \$34,943.02, for damages to, and destruction of buildings and grounds located on the premises known as the fairgrounds of the Maryland State Fair (Inc.), at Laurel, Md., by United States troops during the fall of 1917. A hearing has been conducted by the Appeal Section, at which the claimant and its attorney were present.

2. The circumstances under which the claim arises are as follows: In December, 1917, there was an epidemic of "Flu" at Camp Meade, Md. On account of lack of space and accommodations at Camp Meade, it was deemed expedient to transfer without delay, the First Battalion, Twenty-third Engineers to another location, and for that purpose competent military authority took possession of the fairgrounds at Laurel, Md., property of claimant, which was only about 6 miles from Camp Meade, and the troops entered upon the premises on December 28, 1917. The buildings were hastily transformed as

well as could be, into quarters for the outfit, and such furniture, messing equipment, and other property as was found, was summarily taken and used to supplement the incomplete equipment of the several company organizations. The buildings and improvements on the premises were such as are usually found at race tracks, and consisted for the most part of a grandstand and clubhouse building, stables, sheds, fences, a race course, roads, walks, shrubbery, lawns, water and sewer systems, and a Pari-Mutual bookmaking outfit. A restaurant had been installed in the grandstand and the clubhouse was furnished with chairs, benches, settees, tables, desks, rugs, etc. Owing to the emergency and the haste with which the movement was effected, the Quartermaster Department had been unable to provide an adequate supply of fuel. The weather was very cold, and in this extremity the troops were obliged to tear down fences, partitions and parts of buildings, using the lumber so obtained as fuel for heating and cooking purposes.

3. The fairgrounds premises were occupied by the troops from December 28, 1917, to July 13, 1918, under verbal authority and permission given by the late R. A. Johnson, of Laurel, Md., president of the Maryland State Fair (Inc.), claimant. A lease providing for the payment of \$1 consideration for occupation of the premises by the United States was prepared, but was never executed by either of the parties.

4. Hearings were conducted at Laurel, Md., on April 21, 22, 23, and 26, 1920, by Maj. John G. Winter, of the War Department Board of Appraisers.

5. From the testimony of Mr. W. A. Wimsatt, wholesale lumber dealer in Washington, D. C., an expert on the prices of lumber (Tr., Jan. 7, 1921), and of Mr. William J. Long, estimator and appraiser for the Construction Service, Quartermaster Department, Washington, D. C. (Tr., 34, 35, 36), the fair market price of lumber of the quality and sizes and of hardware in 1918 delivered on the fairgrounds at Laurel, Md., used in repairing the premises of the Maryland State Fair, and the cost of labor necessary to do the reconstruction work, are fixed as follows:

Lumber per thousand feet.....	\$55. 00
Nails per thousand feet of lumber.....	2. 50
Hinges, barrel bolts, and staples per thousand feet of lumber.....	. 50
Labor per thousand feet of lumber.....	30. 00

It was agreed between counsel for claimant and the United States at the hearing that the entire record as made up by the Appraisal Section, including the transcript of testimony taken before that section, might be received and considered as having been regularly offered in evidence on this hearing.

6. The items composing the claim as amended are presented by claimant as follows:

Summary of damages sustained:

Folio 1. Lumber taken or destroyed	\$11,138.52
Folio 2. Furniture destroyed or missing	2,737.75
Folio 3. Damage to drain pipe	100.00
Folio 4. Evergreens destroyed	615.00
Folio 5. Fire hose destroyed	429.65
Folio 6. Labor used to restore grounds	13,901.90
Folio 7. Electric lamps destroyed	195.10
Folio 8. Paint destroyed	150.00
Folio 9. Fencing destroyed	360.00
Folio 10. Miscellaneous items destroyed	5,315.10
Total damages claimed	34,943.02

7. The Appraisal Section, however, in its report, has subdivided the claim into 45 items, as follows:

JULY 10, 1920.

RECAPITULATION.

It appears that the liability of the United States under the several items of this claim is as follows:

Item 1. Grand stand	\$71.78
Item 2. Judges' stand	
Item 3. Clubhouse	
Item 4. Mess hall No. 1	6.00
Item 5. Mess hall No. 2	6.00
Item 6. Mess hall No. 3	6.00
Item 7. Stables A, B, C, E, F, G	1,180.71
Item 8. Twenty-four box stalls	1,357.80
Item 9. Barn I (formerly barn M)	126.13
Item 10. Barn J (formerly barn N)	389.47
Item 11. Barn K (formerly barn O)	483.28
Item 12. Mess hall No. 4	6.00
Item 13. Mess hall No. 5	6.00
Item 14. Shed row No. 10	245.00
Item 15. Burned buildings, barn A	192.91
Item 16. Burned buildings, barn B	48.38
Item 17. Burned buildings, barn C	71.85
Item 18. Burned buildings, barn D	145.16
Item 19. Shed rows 2, 3, and 4	142.10
Item 20. Barn K	68.60
Item 21. Barn U	44.10
Item 22. Barn V	272.84
Item 23. Barn W	14.70
Item 24. Barn X	98.00
Item 25. Barn Y	24.50
Item 26. Barn Z	44.10
Item 27. Shed row No. 5	14.70
Item 28. Shed row No. 3	53.90
Item 29. Shed row No. 4	34.30
Item 30. Shed row No. 8	989.01

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Item 31. Damage to roads-----	\$2, 718. 00
Item 32. Paddock-----	150. 00
Item 33. Front lawns -----	2, 000. 00
Item 34. Infield-----	420. 00
Item 35. Shrubbery-----	403. 32
Item 36A. Fencing-----	4, 892. 77
Item 36B. Wire fencing destroyed-----	360. 00
Item 37. Credits to the United States for material, no liability-----	
Item 38. 150 gallons of paint-----	
Item 39. Fire hose destroyed-----	214. 82
Item 40. Damage to drainpipe-----	75. 00
Item 41. Lumber stored in barns C and D-----	346. 88
Item 42. Repairs to one Parl-Mutual booth-----	48. 46
Item 43. Miscellaneous items destroyed-----	1, 423. 85
Item 44. Electric-light lamps destroyed-----	195. 10
Item 45. Furniture destroyed and missing-----	1, 824. 16
<hr/>	
Total liability of United States-----	21, 215. 08

Credit of \$1,374.88 is allowed the United States for certain lumber purchased for and delivered to claimant, which amount deducted from the total liability of \$21,215.08, leaves an apparent liability to claimant of \$19,840.20. In making its award the Appraisal Section amended this report by reducing the amount allowed on subdivision (i) item 43, on 49 bookmakers' booths and 200 rollers for same of \$788.80 to \$232.75, and by rejecting the amount allowed on subdivision (l) item 43 of \$180, and also the amount allowed on subdivisions (n, o, p, q, r, s, and t) item 43, of \$185. The above deductions, aggregating \$921.15, from the report as submitted, leaves a balance of \$18,919.05, the amount of the award recommended by the Appraisal Section in full settlement of all claims of the Maryland State Fair (Inc.), growing out of the facts and circumstances hereinabove described. Further findings of fact will be incorporated in the decision as found necessary.

DECISION.

1. Unquestionably claimant is entitled to be reimbursed the actual damages sustained by it incident to the occupancy of its premises at Laurel, Md., by United States troops from December 28, 1917, to July 13, 1918. The difficulty is in determining the correct rule applicable to the various items composing the claim for the proper admeasure-ment of such damages. It would appear that the rule adopted by the Appraisal Section is acceptable as being on a fair and equitable basis, viz:

“determine the cost of restoration, and deduct therefrom a certain sum as representing the excess value of the restored property from the value of the property which was damaged or destroyed.”

The sum so deducted should in all cases be fair and reasonable.

2. With these general remarks, we will proceed to the consideration of the items of the award issued by the Appraisal Section in the order as arranged by that section.

Item 1. Grand stands----- \$71. 78

The amount fixed in this item by the report of the Appraisal Section apparently was arrived at by estimating the price of lumber, hardware, and labor necessary to do the reconstruction work at Camp Laurel from general information, rather than from the sworn testimony of witnesses. The same may be said of many other items of the report. Mr. William J. Long was, and still is, a Government employee, and qualified as an expert before this Board on the above items, while Mr. W. A. Wimsatt was shown to be a disinterested witness, and also an expert. Each was introduced as a Government witness. No evidence was offered to offset or contradict their testimony. The price we have fixed for lumber, hardware, and labor in paragraph 5 of the Findings of Fact is based mainly upon the sworn testimony of these witnesses, and this item should be revised in accordance with the prices we have fixed in that paragraph. A reasonable amount due to depreciation in value should be deducted in accordance with the rule set out in paragraph 1 of this decision. The uncontradicted testimony of Mr. Keegan was to the effect that it required the labor of two men one week to replace 300 feet of 2-inch galvanized-iron pipe which had been removed by the troops from its original position under the grand stand. He further testified that the cost of labor for performing work of this character was approximately \$6 per day at this time (Appraisal Tr., pp. 28-29). The claimant is entitled to be reimbursed the amount necessarily expended for this labor and the item should be revised accordingly.

Item 2. Judges' stand ----- 0. 00

Item 3. Clubhouse ----- 0. 00

The damage claimed in this item is for the canvass roof of the clubhouse used as a viewing stand during the races and was occasioned by the soldiers walking on same. We have carefully examined the testimony bearing upon this item (Appraisal Tr., pp. 31-42), and it is our opinion that claimant should be reimbursed in the sum of \$150 as full compensation for the damages claimed.

Item 4. Mess hall No. 1----- \$6. 00

Claimant accepts the award on this item.

Item 5. Mess hall No. 2----- \$6. 00

Claimant accepts the award on this item.

Item 6. Mess hall No. 3----- \$6. 00

Claimant accepts the award on this item.

Item 7. Stables A, B, C, E, F, G----- \$1, 180. 71

The principal objection raised by claimant to this item is based upon the price of lumber, hardware, and labor fixed by the Appraisal Section in determining the cost of restoration. Reference is made to what we have said and held in paragraph 5 of the Findings of Fact and paragraph 1 of this decision as to prices of lumber, hardware, labor, and depreciation in value as a proper basis for revising this item of the report and award of the Appraisal Section.

Item 8. Twenty-four box stalls----- \$1,357.30

What we have said in regard to item 7 above is applicable to this item.

Item 9. Barn I (formerly barn M)----- \$126.13

This item is for lumber of which stalls were built and which was torn out of this barn. The report appears to have been erroneously based upon a partial list of lumber as given by Mr. Keegan, 1,352 feet (Appraisal Tr., p. 61), rather than upon the complete list of lumber as testified to by Mr. Keegan, of 6,480 feet (Appraisal Tr., p. 63). The testimony of Mr. Keegan is undisputed and the item should be revised so as to allow the full number of feet of lumber testified to by Mr. Keegan, applying the same prices and rule as to lumber, hardware, labor, and depreciation in value in the restoration of same as we have set out in paragraph 5 of the Findings of Fact and paragraph 1 of this decision.

Item 10. Barn J (formerly barn N)----- \$389.47

Item 11. Barn K (formerly barn O)----- 483.28

These two items are for lumber of which stalls were built and which was torn out of these barns. There appears to be no controversy over the number of feet of lumber removed from each barn. Reference is made to what we have said and held in paragraph 5 of the Findings of Fact and paragraph 1 of this decision as to prices of lumber, hardware, labor, and depreciation in value as a proper basis for revising these items of the report.

Item 12. Mess hall No. 4----- \$6.00

Claimant accepts the award on this item.

Item 13. Mess hall No. 5----- \$6.00

Claimant accepts the award on this item.

Item 14. Shed row No. 10----- \$245.00

This item is for lumber, of which 90 partitions were built, and which was torn out and destroyed. The report of the Appraisal Section allowing 5,000 feet of lumber for restoration of this building is based upon an estimate made in March, 1918, by Mr. Keegan and the master mechanic of headquarters company on an order of the commanding officer, Camp Laurel, Md. It is thought an adjustment

may properly be based on these figures, but the prices of lumber, hardware, and labor, and the rule for depreciation in value which we have set out in paragraph 5 of the findings of fact and paragraph 1 of this decision should be applied and followed, and the item revised accordingly.

Item 15. Burned buildings, barn A----- \$192. 91

This item is for lumber torn out and destroyed. There is no dispute as to the number of feet of lumber required for restoration, but objection is taken by claimant to the price of lumber, hardware, and labor fixed by the Appraisal Section in determining the cost of restoration. Reference is made to what we have said and held in paragraph 5 of the findings of fact and paragraph 1 of this decision as to the prices of lumber, hardware, labor, and depreciation in value as a proper basis for revising this item of the report and award of the Appraisal Section.

Item 16. Burned buildings, barn B----- \$48. 38

What we have said in regard to item 15 above is applicable to this item.

Item 17. Burned buildings, barn C----- \$71. 85

What we have said in regard to item 15 above is applicable to this item.

Item 18. Burned buildings, barn D----- \$145. 16

What we have said in regard to item 15 above is applicable to this item.

Item 19. Shed rows 2, 3, and 4----- \$142. 10

What we have said in regard to item 15 above is applicable to this item.

Item 20. Barn K----- \$68. 60

What we have said in regard to item 15 above is applicable to this item.

Item 21. Barn U----- \$44. 10

What we have said in regard to item 15 above is applicable to this item.

Item 22. Barn V----- \$272. 84

What we have said in regard to item 15 above is applicable to this item.

Item 23. Barn W----- \$14. 70

What we have said in regard to item 15 above is applicable to this item.

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Item 24. Barn X----- \$98. 00

What we have said in regard to item 15 above is applicable to this item.

Item 25. Barn Y----- \$24. 50

What we have said in regard to item 15 above is applicable to this item.

Item 26. Barn Z----- \$44. 10

What we have said in regard to item 15 above is applicable to this item.

Item 27. Shed row No. 5----- \$14. 70

What we have said in regard to item 15 above is applicable to this item.

Item 28. Shed row No. 3----- \$53. 90

What we have said in regard to item 15 above is applicable to this item.

Item 29. Shed row No. 4----- \$34. 80

What we have said in regard to item 15 above is applicable to this item.

Item 30. Shed row No. 8----- \$989. 01

What we have said in regard to item 15 above is applicable to this item.

Item 31. Damage to roads----- \$2, 718

We have carefully examined the testimony bearing upon this item and are of the opinion that the report and award of the Appraisal Section gives substantial justice to claimant, and the same is accordingly approved. (Appraisal Tr., pp. 123-148.)

Item 32. Paddock----- \$150

Claimant accepts the award on this item.

Item 33. Front lawns----- \$2, 000

What we have said in regard to item 31 above is applicable to this item. (Appraisal Tr., pp. 158-182.)

Item 34. Infield ----- \$420

What we have said in regard to item 31 above is applicable to this item. (Appraisal Tr., pp. 183-195.)

Item 35. Shrubby----- \$403. 32

What we have said in regard to item 31 above is applicable to this item. (Appraisal Tr., pp. 195-201.)

Item 36-A. Fencing----- \$4, 892. 77

This item is for fencing which was destroyed. We are of the opinion, and so hold, that the report and award of the Appraisal Section on this item should be revised only in respect to the prices of lumber, hardware, and labor necessary for the restoration of the fences, which should be done in accordance with the prices set out in paragraph 5 of the Findings of Fact.

Item 36-B. Wire fencing destroyed----- \$360

Claimant accepts the award on this item.

Item 37. Credits to the United States for material----- 0. 00

This item is for lumber left by the Twenty-third Engineers on the fairgrounds at Laurel and was delivered by the Government to claimant. In determining the credit to which the Government is entitled for this lumber, the basis fixed for the price of lumber delivered at Laurel as set out in paragraph 5 of the Findings of Fact should be adopted and followed.

Item 38. 150 gallons of paint----- 0. 00

In our opinion the evidence bearing upon this item is not convincing that claimant is entitled to be reimbursed for the value of this paint, and the report and award of the Appraisal Section is accordingly approved.

Item 39. Fire hose destroyed----- \$214. 82

The award of the Appraisal Section on this item is approved.

Item 40. Damage to drainpipe----- \$75

This was originally a terra-cotta drainpipe from the cesspool. This pipe was dug up and destroyed by the soldiers. After the premises were turned back by the Government claimant expended the sum of \$1,800 in improvements to this drainage system, and the original claim on this item was \$1,800. A board of officers designated as "Maj. Mayo's board" awarded claimant \$600 on the item, \$100 to cover broken pipe, and \$500 to cover labor for digging up and replacing the pipe. Claimant thereupon amended its claim to correspond with this award of \$600. Claimant offers no satisfactory evidence of the amount of damage to its premises in this regard which was done by the soldiers. The fact that it expended the sum of \$1,800 in improving its drainage system is not convincing that the Government is liable in that amount for any damage which might have been done by the troops as to this item. The report and award of the Appraisal Section is accordingly approved.

Item 41. Lumber stored in barns C and D----- \$346. 88

This item is for lumber stored in barns C and D, which was destroyed. What we have said in regard to item 15 above is applicable to this item.

556 DECISIONS APPEAL SECTION WAR DEPARTMENT CLAIMS BOARD.

Item 42. Repairs to one Pari-Mutual booth-----	\$48.46
Item 43. Miscellaneous items destroyed-----	\$1,423.85
Item 45. Furniture destroyed and missing-----	\$1,824.16

We have carefully examined the evidence bearing upon these three items, and while it is possible that the report of Maj. J. G. Winter to the Appraisal Section on each may have been increased, yet we are not prepared to say that substantial justice has been denied claimant in regard to same. The fact that an inventory was taken by Mr. McKain for claimant in November, 1915, showing the presence on the premises of certain articles of personal property, and the fact that the articles were not accounted for when the premises were returned to claimant by the Government in July, 1918, is not convincing or persuasive to our minds that the articles were on the premises when the troops took possession in December, 1917, and were subsequently destroyed by the troops. It is noted that the allowance made in the first instance by Maj. Winter in subdivision (i) of item 43 for 49 bookmakers booths and 200 rollers for same of \$788.90 was reduced to \$232.75, and that the allowance made by Maj. Winter in subdivision (l), item 43, for valves destroyed or broken, of \$180, was rejected entirely, and that the allowance made by Maj. Winter in subdivisions (n), (o), (p), (q), (r), (s), and (t) of item 43, being for various items of personal property, of \$185 was rejected entirely. The reduction and rejections in this item of the report were made by the Appraisal Section. While these allowances made by Maj. Winter are considerably less than the amounts insisted upon by claimant, yet in view of all the circumstances in this case, and particularly in view of the fact that Maj. Winter personally visited the fair grounds and made investigation as to these items and in view of the fact that the testimony relative to same was taken on the premises by Maj. Winter, and apparently sustains his recommendations as to same, we are of the opinion that the amounts in these various subdivisions of item 43 as fixed and determined by Maj. Winter should be allowed to stand as the proper amounts for just compensation to claimant on these several articles of personal property. We are, therefore, of the opinion that the amount stipulated in Maj. Winter's report to the Appraisal Section of July 10, 1920, as to item 43, viz, \$1,423.85, should be approved and that the award of the Appraisal Section as to this item should be revised accordingly.

Item 44. Electric-light lamps destroyed-----	\$185.10
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Claimant accepts the award on this item.

3. The Appeal Section, War Department Claims Board, is of the opinion, and so holds, that claimant is entitled to relief and that the

award of the Appraisal Section should be revised and one issued by that section in accordance with this decision, and for this purpose the case should be remanded to the Appraisal Section.

DISPOSITION.

The Appeal Section, War Department Claims Board, will transmit the record in this case, together with a copy of this decision, to the Appraisal Section, War Department Claims Board, for its consideration and appropriate action.

Lieut. Col. McKeeby and Capt. Frazer concurring for the Appeal Section, Col. Morrow concurring for the War Department Claims Board.

FEBRUARY 3, 1921.

Case No. 3045.

***In re* CLAIM OF GODDARD TOOL CO.**

- 1. INFORMAL AGREEMENT.**—Where a purchase order for work on thread gauges provides for the replacement of rejected gauges at contractor's expense, and claimant immediately enters an objection to this provision, but accepts the order by commencing performance of same after an interview with a Government official, who informs claimant that this provision can not be eliminated, the terms of the purchase order will be strictly followed in determining a settlement with claimant after suspension.
- 2. FACILITIES.**—An implied agreement does not arise under the act of March 2, 1919, from the requests of Government officials for the contractor to increase production.
- 3. CLAIM AND DECISION.**—Claim involves \$17,808.27, under the act of March 2, 1919, for work performed on thread gauges. Held, claimant entitled to recover in accordance with the terms of the purchase order for work on thread gauges, but can not be allowed expenditures incurred for facilities.

Capt. Miller writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Air Service Section, War Department Claims Board, dated July 28, 1920, which rejected a claim for \$4,475.22 and found an overpayment to claimant of \$13,333.05 in connection with work on thread gauges.

2. On April 15, 1918, Mr. T. F. Hanley, jr., assistant executive, Section of Gauges and Standards, Bureau of Aircraft Production, visited claimant's plant at Chicago, Ill., and after an interview with Mr. G. R. Monks, sales manager of the Goddard Tool Co., placed with that company the following blanket order for thread gauges:

“Blanket order for the sum of \$25,000 is herewith placed.

“Present orders placed against this blanket order for the following size gauges:

“400 each, male, 5/16-inch by 24—GO and NO GO gauge.

“100 each, female gauge, 5/16-inch by 24—GO and NO GO.

“25 each, setting plugs both GO and NO GO.

“It is understood that this order will be confirmed by regular Government order and that the rate will be as follows: \$1.50 per hour for regular time, time and a half for overtime, double time for Sundays, material at cost plus 10 per cent.

"It is understood that you are to start work immediately in your shop, and small quantities are to be delivered at once.

"It is understood that you are to build up to a production of at least 100 gauges per week.

"It is further understood that other specifications will be forwarded to you, to apply against the above blanket order, at a later date."

3. The maximum amount of the order was later increased to \$60,000. Mr. Monks testified that prior to receiving the blanket order from Mr. Hanley he explained to Mr. Hanley that his company "would not stand the responsibility of any rejections or replacements"; that Mr. Hanley replied that the Government had never placed any work on such an understanding, whereupon Mr. Monks informed Mr. Hanley that his company would not accept the order under any other conditions. Mr. Monks further testified that Mr. Hanley's reply was: "How soon can you start work?" Mr. Hanley can not recall this conversation relative to rejected gauges.

4. On April 29, 1918, First Lieut. F. D. Schnacke, A. S., Signal R. C., issued order No. 261 in favor of claimant covering work on thread gauges, these gauges when completed to be shipped to the Signal Corps inspection laboratory at New York City, N. Y., subject to "inspection at destination." This order contained the following clauses which have special bearing on the points now in dispute:

"*Item:* Work on thread gauges, specific orders for which to be placed from time to time by the gauge section, Inspection Department, Equipment Division, Signal Corps-----

"NOTE.—Prices of above to be determined on the following basis:

Labor at \$1.50 per hour.

Overtime at time and one-half.

Doubletime for Sundays.

Materials at cost plus 10 per cent.

"Bills properly certified should be rendered at this office weekly, reference being made to order No. 261.

"All rejected gauges to be replaced at your expense."

5. Specific orders were issued claimant for 2,100 gauges. Claimant was not satisfied with the clause providing for the replacement of rejected gauges at claimant's expense, and on May 2, 1918, forwarded a letter to the office of the Chief Signal Officer for the attention of Lieut. Schnacke, which reads in part as follows:

"Yesterday we received Official Order No. 261, Aero, covering work on thread gauges, specific orders for which to be placed from time to time by the gauge section, inspection department, Equipment Division, Signal Corps, also billing forms, and before we can formally accept this order we call your attention to the note reading, 'All rejected gauges to be replaced at your expense.'

"This is contrary to our method of taking on hourly based work, and we think it advisable to call your attention to this fact before

we have done any great amount of work on the order, for in the event that any of these gauges do not pass your inspection and are returned for corrections we will expect to charge you for this work.

* * * * *

"Will you kindly confirm our understanding as per the above at your earliest convenience?"

6. Claimant did not receive a written reply to its letter of May 2, 1918. However, First Lieut. Nelson B. Gatch, A. S., Signal R. C., visited claimant's plant within a few days after May 2, 1918, whereupon Mr. Paul B. Goddard, president of the Goddard Tool Co., handed Lieut. Gatch a copy of claimant's letter of May 2, who read same, and, according to the testimony of Mr. Goddard, said: "Well, the Government, as far as I know, has never placed any business on this basis." Mr. Goddard stated that he replied: "Well, Lieutenant, here's one place where they did place an order on that basis, and that is the basis that we are proceeding on." According to the testimony before this Board, no further discussion was had concerning the replacement of rejected gauges, but it appears that Lieut. Gatch was definite in advising claimant that under the order claimant was to replace rejected gauges at its expense.

7. Lieut. Schnacke, on May 6, 1918, forwarded to Lieut. Gatch a copy of claimant's letter of May 2 requesting advice as to whether Order No. 261 should be amended. Lieut. Gatch replied on May 11, 1918, as follows:

"In reply to paragraph 2, beg to advise that no amendments of Signal Corps Order No. 261, in favor of the Goddard Tool Co., are necessary."

This indorsement was prepared and signed after Lieut. Gatch's visit to claimant's plant, when he and Mr. Goddard had the discussion relative to rejected gauges.

8. On the occasion of Lieut. Gatch's visit to claimant's plant in the early part of May, 1918, he and Mr. Goddard discussed the question of facilities, the testimony of Mr. Goddard on this point being in part as follows:

"Well, we continued to discuss the enlargement of our facilities, and I told the lieutenant that we had just entered into a lease on the plant that we called our plant No. 2, on Deversy Boulevard, and that we were only occupying part of that space, but that we could take over the balance of the unoccupied space in the building very shortly, because the tenant was about to move out, and I asked him if he would like to see it. He said he certainly would. So Mr. Persons and Lieut. Gatch and myself drove up to the plant and he inspected it, and he was quite enthusiastic about it, and he asked me how much money I thought it would take to fill that up with machines—machinery for making thread gauges. I told him that I did not know, but that if the Government would be interested in

having me make them a proposition along that line I would be very glad to do so. He said they most certainly would, and he wanted me to get it to them at the very earliest possible moment. So I immediately started in estimating the amount of money that it would take to manufacture special machinery which was required for the manufacture of these gauges, and as soon as I had completed the estimate I sent a day letter, I believe—a day or night letter—to Lieut. Gatch making the Government a definite proposition, which they did not accept.” (Trans., pp. 46 and 47.)

9. Claimant incurred some expenses for special facilities and is asking for the sum of \$2,988.35 for losses incurred on these facilities, this item of the claim being based on an implied agreement arising through requests of the Signal Corps for claimant to take steps to increase its production, one of these requests being the letter of May 22, 1918, in which the Signal Corps said:

“It is our opinion that you can greatly increase this production, and we trust that you will take whatever steps are necessary to insure a large increase in your production for this week.”

10. Claimant manufactured and delivered at least 1,792 thread gauges and was paid on its weekly pay roll for work performed on same. On November 23, 1918, the contract was suspended. In complying with the suspension notice claimant boxed from 600 to 800 uncompleted gauges for disposition in accordance with future instructions of the War Department.

11. Mr. Henry Shafer, cost accountant, audited claimant's books and records with a view to determining the proper cost to be charged the Government for work on the thread gauges under Order No. 261. In construing the terms of the order relative to direct and indirect labor, overtime, double time, rejected gauges, etc., he reported that claimant had been overpaid \$11,856.73.

12. Claimant objected to Mr. Shafer's report, whereupon Mr. W. J. Barry, senior cost accountant, A. S., Liquidation Division, made a new audit. His report shows that claimant has been overpaid \$13,333.05, and on the strength of this report the Air Service Section, War Department Claims Board, on July 18, 1920, disallowed the claims for \$4,475.22, approved the report of Mr. Barry, and referred the papers to the Liquidation Division for the purpose of collecting the overpayment of \$13,333.05. The present appeal was then taken from the decision of the Air Service Section. As a result of this audit three questions have arisen, and it becomes necessary to discuss separately the facts concerning each question.

13. The first question hinges on the meaning of the term “labor” as used in Order No. 261. Mr. Barry's report limits claimant to payment for direct labor and eliminates charges for inspectors, millwrights, repair men, laborers in tool crib, shippers, and draftsmen. Claimant insists that it should be paid at the rate of \$1.50 per hour,

with the usual overtime and double time allowance for the services of such persons engaged in work on this order, and produced as a witness Mr. R. W. Coates, a former accountant of the Ordnance Department, who testified that in auditing the accounts of a company which had been operating on an hourly basis there were instances in which there should be allowed the labor of inspectors, millwrights, repair men, tool-crib men, and draftsmen, if such labor was distributed to a particular job. Mr. Hanley, the officer who negotiated the contract, said that there should be charged as labor on the hourly basis only direct labor at the bench and the labor of inspectors, but thought that claimant should pay the wages of millwrights, repair men, laborers in tool crib, shippers, and draftsmen from its profit on direct labor.

14. Claimant introduced in evidence an organization chart which had been followed by Mr. Barry in making his audit, stating that this chart was not used by claimant in assigning its employees to various tasks, and that consequently the auditor should not have followed the chart in determining the amount of direct and indirect labor.

15. The second point in dispute calls for an interpretation of the provision: "Labor at \$1.50 per hour; overtime at time and one-half; double time for Sundays." Claimant says that under this order it should be allowed \$2.25 per hour for overtime and \$3 per hour for Sundays. This contention is not only borne out by claimant's witnesses but also by Mr. Hanley, who testified that it was his intention in negotiating the contract to allow claimant these rates for overtime and double time. Mr. Barry's report reduced the allowance per hour for overtime and double time through restricting claimant to the same profit on double time and overtime as it received on straight time. He also disallowed the efficiency bonus hours given by claimant to employees who had reached a certain standard in work and attendance during the week.

16. The third point in dispute covers the question as to whether claimant should replace rejected gauges at its expense. Mr. Barry's report was prepared on the assumption that claimant should repair all rejected gauges at its own expense. Claimant insists that the Government should bear this cost of replacing gauges. Mr. Hanley's testimony shows that he did not expect the Government to stand this expense. Furthermore, he explained to Lieut. Gatch early in May that it was his understanding that claimant was to replace the rejected gauges at its expense.

17. It also developed at the hearing that Mr. Barry's audit covering the number of rejected gauges was not correct. Mr. Barry showed that claimant had failed to account for 365 gauges returned

to claimant by the Government, and that claimant had replaced 279 gauges, making a total of 644 gauges rejected and returned to claimant. Claimant at the hearing introduced the original copies of returned-goods tickets, which showed a total of 609 gauges returned by the Government to claimant. Of this number 160 were reshipped to the Government without further work, 166 were re-marked, 267 were relapped, and one was readjusted, while 15 were scrapped. This accounts for 609 of the 644 gauges which Mr. Barry's report shows were returned by the Government. Claimant has therefore failed to account for 35 rejected gauges. Claimant also introduced at the hearing shipping orders covering the shipment of both original and replaced gauges.

18. Mr. Barry's audit as to the number of rejected gauges not replaced was determined from records of the section of gauges and standards. It appears that the difference between his count and the number shown as returned by the actual returned-goods tickets is caused by the fact that claimant returned some gauges to the Government without noting the fact that these gauges had been rejected previously. This causes Mr. Barry's audit to show a larger total of gauges originally manufactured than were actually originally manufactured, inasmuch as he did not account for certain reshipped gauges as replacements. It is apparent that he did not have an opportunity to audit the returned-goods tickets now before this Board.

DECISION.

1. It is clear that the hourly rate for work on gauges included direct labor only. Claimant was paid practically twice as much for this direct labor as the cost of same to claimant, and the profit on the direct labor was to take care of claimant's expenses for indirect labor and other items, such as interest, rents, etc.

2. The evidence of claimant, as well as that of the Government witnesses, shows conclusively that the labor of inspectors should be included as direct labor inasmuch as these inspectors were compelled to make frequent inspections of the gauges while same were being manufactured.

3. Claimant objects to the organization chart followed by Mr. Barry and insists that the services of some of the employees charged under the head of indirect labor were used as direct labor. However, the evidence presented by claimant to this Board is not sufficient to show that the indirect labor, amounting to 3,058.4 hours, should be charged as direct labor.

4. Claimant can not charge the Government with the cost of efficiency bonus hours. The Government's order did not include any

agreement to pay claimant for hours donated by claimant to its employees, and this Board therefore finds that claimant must stand the expense of the efficiency bonus hours.

5. The clause in the order referring to overtime and Sundays has one, and only one, meaning. This Board finds nothing ambiguous in this provision, and claimant should receive \$2.25 per hour for overtime and \$3 per hour for labor of its employees performed on Sundays. This was certainly the intention of the Government when the contract was issued, as evidenced by the testimony of Mr. Hanley. The proportion of overtime and double time is relatively small, and the record shows that claimant made no effort to take advantage of this provision. It is not just for the Government to construe the contract such as to give claimant less than \$2.25 per hour overtime and \$3 per hour for labor performed on Sundays.

6. After considering the terms provided in the purchase order, as well as all surrounding circumstances, including negotiations had by Mr. Hanley prior to the issuance of this purchase order and the discussion between Lieut. Gatch and Mr. Goddard, after claimant had written its letter of May 2, the Board finds that under the terms of this agreement claimant was to replace all rejected gauges at its expense. It is true that the testimony of claimant's witnesses and those of the Government are not in strict accord concerning the conversation between Mr. Hanley and Mr. Monks on the date the original blanket order was issued. However, Mr. Monks's testimony does not show that Mr. Hanley agreed to claimant's proposition concerning the replacement of rejected gauges. Furthermore, Mr. Hanley's conversation with Mr. Monks on this question might well be eliminated in view of the fact that the actual agreement should be determined through the consideration of the terms of the order of April 29, claimant's letter of May 2, and the interview between Lieut. Gatch and Mr. Goddard a few days after the date of this letter. The purchase order states definitely that claimant shall replace all rejected gauges at its expense. Claimant's letter of May 2 says that it will expect to charge the Government for the work of replacing gauges, and requests a confirmation of this understanding. Lieut. Gatch replied to this letter of May 2 in person, informing claimant that if it accepted the order it would be compelled to replace rejected gauges at its expense. Claimant entered an objection, but did accept the order through actual performance. The replacing of rejected gauges was clearly claimant's, not the Government's, responsibility. It is therefore held that claimant must be charged with labor performed in replacing these gauges.

7. Claimant has accounted for all except 35 of the gauges returned by the Government for replacement and shows 15 gauges

scrapped. The record, therefore, now fails to show the replacement by claimant of 50 rejected gauges, and claimant should be charged with the expense of manufacturing these 50 gauges.

8. However, the new evidence before the Board shows that claimant did not originally manufacture as many gauges as stated by Mr. Barry. The cost of manufacturing each gauge would, therefore, be increased if it were not for the fact that Mr. Barry's audit fails to take into account the uncompleted gauges, numbering between 600 and 800, now held in claimant's plant for disposition as the Government sees fit. The labor performed on these uncompleted gauges is included in the total number of hours devoted to the purchase order; and when a proper accounting is made, to give credit for the number of hours performed on these uncompleted gauges, the cost of manufacturing each gauge is reduced.

9. It should be noted that no work was done on 160 of the gauges reshipped. However, the record shows that as to the balance the average cost of replacement should not exceed 75 cents per gauge. Mr. Hanley placed the cost of replacement at 75 cents per gauge, and the audit of Mr. Barry shows an average cost of 73.4 cents per gauge on seven gauges. In view of the fact that claimant has failed to keep a definite record of labor performed in replacing gauges, it is thought that the average of 73.4 cents per gauge should be charged for this work. This Board finds that the returned goods' tickets introduced in evidence by claimant show the correct number of gauges reshipped by claimant. In manufacturing these gauges claimant was held to a very close tolerance; that is, the gauges were rejected if more than two ten-thousandths of an inch from the specifications. The heat of one's hand often increases the size of the gauge by one ten-thousandth of an inch, and it is therefore readily understood how claimant could reship 160 acceptable gauges without performing any additional work on same.

10. The claim for special facilities arising under an alleged implied agreement can not be allowed. It is no doubt true that Lieut. Gatch discussed the question of special facilities with claimant and that it was suggested to claimant that it submit its proposition to the Government. However, when this proposition was submitted the Government rejected same. Furthermore, the attempts by the Government to speed up production can not be construed as an implied agreement, under the act of March 2, 1919, that the Government would remunerate claimant for expenditures incurred in purchasing machinery and other special facilities in order to increase its production.

11. Of course claimant must be paid for the cost of its material plus 10 per cent, in accordance with the terms of the purchase order.

DISPOSITION.

The Appeal Section, War Department Claims Board, will make and transmit to the Air Service Section, War Department Claims Board, a statement of the nature, terms, and conditions of the agreement and certificate C for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division, General Staff.

Lieut. Col. McKeeby and Capt. Frazer concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

FEBRUARY 4, 1921.

Case No. 2919.

In re CLAIM OF AMERICAN CAN CO.

MERGER.—Where an informal proxy-signed contract is subsequently amended by two formally executed so-called supplemental contracts which strike out of the said informal contract certain portions thereof relating to the method of payment and the furnishing of materials and providing that the articles contracted for shall be paid for on a unit-price basis instead of a cost-plus basis, the informal contract is merged in the subsequently executed formal supplements.

RELEASE—SETTLEMENT CONTRACT.—Where claimant had a proxy-signed contract providing for the delivery by it to the Government of certain articles therein called for upon a cost-plus basis, which said informal contract was later amended and supplemented by two formal contracts, the last of which reduced the number of articles to be delivered from 4,000,000 to 2,500,000 and provided that the payment to claimant of \$8.50 for each of the 2,500,000 shells "shall be accepted by the said contractor in full satisfaction of any and all claims arising out of the said original contract as hereby amended," same is a settlement contract and release, and upon payment of the same any claim the contractor might have had against the Government is fully satisfied and released.

MISTAKE—REFORMATION OF CONTRACT UNDER ONE.—The Secretary of War can only reform contracts on the ground of mistake under such circumstances as would justify a court of equity in reforming a contract, and the evidence must be clear and positive and establish by a preponderance of the same the existence of the mistake alleged.

JURISDICTION.—Where a proxy-signed contract is later supplemented and amended by a formally executed supplement which is, in turn, again amended by a formally executed supplement, the said informal contract becomes merged in the subsequent formal supplements and the resultant contract is a formal contract, so that when the same has been completed by performance and payment, the Secretary of War has lost any jurisdiction to adjust or settle any disputes arising under the same.

CLAIM AND DECISION.—Claim is for \$2,600,000, and was originally filed before the Ordnance Section, War Department Claims Board, which granted partial relief. From this decision claimant appealed to the Appeal Section, War Department Claims Board. Held, all relief will be denied.

Maj. Farr writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is a class A claim for \$2,600,000 and is before this Board on appeal from the Ordnance Section, War Department Claims

Board, which decision was, in part, favorable to the claimant. The claim arises under a proxy-signed contract dated December 31, 1917, and two formal supplemental contracts dated November 1, 1918, and February 1, 1919, the facts being as follows:

2. By a proxy-signed contract dated December 31, 1917, the United States Government entered into an agreement with the claimant for the manufacture, upon a cost-plus basis, under Contract G781-430A for 4,000,000 complete rounds of 75-mm. high-explosive shells, the parts of the contract material to the question in issue being:

"ARTICLE I. The contractor agrees to manufacture and deliver to the United States 4,000,000 complete rounds of 75-mm. high-explosive shell, hereinafter called the articles, each of the articles being referred to as a unit or round, in accordance with the drawings and specifications hereto attached and made a part hereof, marked 'Schedule 1,' and such changes as may be made therein as hereinafter provided, and the United States agrees to pay therefor, all upon the terms and conditions in this contract set forth.

"ARTICLE II. Time being of the essence the contractor agrees to provide, with the utmost dispatch, and at the best prices consistent with the interests of the United States: (1) Such administrative, purchasing, manufacturing, and accounting organization; and (2) such labor, perishable tools, material, supplies, and the like, in addition to its present organization and facilities, as may be necessary to enable the articles to be made and the requirements as to delivery and storage of the articles contemplated herein to be complied with.

"ARTICLE III. The contractor agrees to deliver the articles f. o. b. cars at Kenilworth, N. J., in accordance with the following schedule:

	Rounds.
During the month of February, 1918-----	100,000
During the month of March, 1918-----	400,000
During the month of April, 1918-----	500,000
During the month of May, 1918-----	650,000
During the month of June, 1918-----	750,000
During the month of July, 1918-----	775,000
During the month of August, 1918-----	825,000

"Time being of the essence, the contractor undertakes to increase the production to such a maximum rate as facilities and equipment permit * * *.

"ARTICLE IV. The United States will make the following payments to the contractor:

"(1) The sum of one dollar (\$1) is hereby fixed as the contractor's profit for each unit. Of this sum not more than seventy-five cents (\$0.75) will be paid upon proper certificate of the inspecting and receiving officer showing delivery and acceptance of units during the performance of the contract, as soon as practicable after the 1st of the month for all deliveries of units during the preceding month. The remainder of such fixed profit shall be paid upon the completion of the contract. Such fixed profit is subject to addition or deduction as hereinafter provided.

"The estimated cost of each unit upon which the fixed profit is based is made up of the following:

Steel shell, including booster parts, ready for assembly, f. o. b. Kenilworth N. J.....	\$3. 11
Brass cartridge case, f. o. b. Kenilworth, N. J.....	1. 08
Cleanng and loading with T. N. T. and varnishing shell.....	. 40
Loading, assembling, cleaning, boxing, and painting complete rounds....	. 45
Modified artillery primer, complete, f. o. b. Kenilworth, N. J.....	. 15
Shipping and packing materials for complete rounds.....	. 45
Obturator and distance wadding.....	. 045
Loading booster, f. o. b. Kenilworth, N. J., and loading and packing detonator, f. o. b. Lowell, Mass., exclusive of detonator packing materials..	. 040
General office, administrative, and overhead expense (fixed and not subject to change).....	. 125
Plant depreciation and amortization.....	. 72
Estimated cost to the United States of detonator parts to be furnished..	1. 25
Total estimated cost.....	8. 18

In the above estimate the following prices for materials and purchased parts are used:

	Per pound.
Steel.....	\$0. 0325
Copper.....	. 235
Spelter.....	. 115
Obturator and distant wadding.....	. 045
Detonator parts.....	1. 25
Shipping and packing materials.....	. 45

"It is agreed that for all variations, whether up or down, in the cost of materials above listed a corresponding adjustment shall be made in the estimated cost of \$8.18 for each unit and that, upon the completion of this contract, the fixed profit shall be added to the total cost of \$8.18 adjusted to such increase or decrease in the cost of materials; it being the intention of this contract that the contractor shall neither profit nor lose by any fluctuation in the prices of such materials.

* * * * *

"Approval thereof by the contracting officer or his duly accredited representative is a necessary prerequisite to any obligation on the part of the United States to reimburse the contractor for any expenditures hereafter made or contracted for, for component parts, material, supplies, and the like. Whatever of such component parts, materials, supplies, and the like, does not in all respects fulfill the requirements of the contract shall be rejected, and the decision of the contracting officer or his duly accredited representative as to the quantity and quality thereof, shall be final.

"The title to all such component parts, material, supplies, and the like shall vest in the United States simultaneously with the payment therefor by the United States, and each and every of such component parts, materials, supplies, and the like shall, immediately upon its coming into the possession of the contractor, be marked as and if the contracting officer shall so direct, so that it may be identified.

"(3) The United States shall add to fixed profit, or deduct from fixed profit, as the case may be, as follows:

"Upon the completion of this contract the entire actual cost per unit (exclusive of profit and costs connected directly or indirectly connected with the storage and shipping of the articles herein con-

templated) shall be determined by the contracting officer after the manner in which cost is defined herein and in schedule 2 hereto attached. If the *actual* cost per unit *exceeds* the sum of \$.8.18 adjusted as to increase or decrease of the price of materials as herein listed, the United States shall retain fifty per cent (50%) of such difference or excess: *Provided, however,* That the fixed profit after such deduction shall not be less than fifty cents (\$.50) per unit delivered and accepted. If, however, the *actual* cost per unit *is less than* the sum of \$.8.18 adjusted as to such increase or decrease, the United States will pay to the contractor, in addition to the fixed profit previously paid, all of the fixed profit previously withheld and also fifty per cent (50%) of such difference or savings: *Provided, however,* That the fixed profit after such addition shall not be more than one dollar and fifty cents (\$1.50) per unit delivered and accepted.

"The additional cost of conversion, if any, due to any faulty component parts furnished by the United States shall not be included in arriving at the actual cost upon which the contractor's profit is to be computed.

"The contractor guarantees that charges for 'General office administrative, and overhead expense,' shall not be in excess of \$.125 per unit and agrees that the contractor will bear all expense under this classification in excess of \$.125 per unit.

"The contractor hereby represents that its actual cash investment in plant, equipment, machinery, tools, fixtures, and the like, which will be used in the performance of this contract, is or will become during such performance, three million five hundred thousand dollars (\$3,500,000); and, relying on such representation, the sum of seventy-two cents (\$.72) is hereby fixed and established for 'plant depreciation and amortization,' subject to reduction and adjustment upon the completion of this contract if such representation is found to be incorrect. It is agreed, however, that no reduction or adjustment of this item will be made or asked for, unless the total of such investment shall be found by the contracting officer to have been less than the aforesaid sum.

"To facilitate prompt payments the United States may attach a disbursing officer to the main office or plant of the contractor and shall do so if payments are at any time unreasonably delayed. No payments by the United States shall act to prevent the United States from later disputing the validity thereof under this contract.

"The United States may from time to time furnish the contractor with component parts, material, supplies, and the like relative to the performance of this contract: *Provided, however,* That the contractor's undertakings previously made in good faith are not interfered with. With respect to any material, the source of the contractor's supply of which has failed or is likely to fail, it shall be the duty of the contractor, immediately upon being apprised of such failure or probable failure, to communicate such information to the contracting officer so that the United States may, if it is deemed desirable so to do, arrange for a supply of such component material. All such material furnished by the United States shall be accepted by the contractor at prices set forth in the schedule of materials and component parts herein contained, or at the actual cost thereof to the United States, and the price to be paid by the United States for

the articles as herein fixed shall be reduced by an amount equal to the total of such prices of materials so furnished by the United States.

"The United States agrees to furnish to the contractor all raw materials required in the performance of this contract, 1,000,000 shell-case forgings, and all parts of the Mark III detonating fuze, except parts 40B, 40C, 40E, 40F, 40H, 40K, 40P and N assembled, 40L and M assembled, 40R, 40Q, 40S, protection cap, and tarred string, whenever and wherever the contractor may call for delivery of the same.

"The United States agrees to furnish, without cost to the contractor, nitrocellulose propellant powder, high-explosive bursting charge and booster charges for the articles whenever and wherever the contractor may call for delivery of the same.

"It is agreed that component parts of materials furnished by the United States shall be in accordance with the requirements under the specifications.

"ARTICLE V. To facilitate the determination of the actual costs as allowed in subdivision (2), Article IV, the contractor shall follow any instructions which the contracting officer may from time to time give, including instructions as to—

"(1) The submission of statements thereof, bills therefor, and all other supporting papers;

"(2) The submission of engineer's and accountant's certificates; and

"(3) Such additions to the allowance of cost and such regulations and instructions with regard to their determination as from time to time shall be adopted by the Chief of Ordnance or as may be required in order to enable the contracting officer to issue his proper certificate for payment thereof.

"ARTICLE VII. It is agreed that the contracting officer may, by written notice to the contractor at any time, make changes in the drawings and specifications or supplemental or substituted drawings and specifications which form a part of or are added to this contract. If such changes involve substantially additional work for the contractor's manufacturing organization or labor and material, a fair addition shall be made to the fixed profits, but if such changes involve substantially less of such work or labor and material, a fair deduction (in no event to reduce the fixed profit to an amount less than ten (10) per cent of the actual cost of the articles after such change, computed in the manner as provided in paragraph (2) of Article IV hereof) may be made therefrom, all as shall be determined by the contracting officer. No claim for addition or deduction on account of any such change will be made or allowed unless the same has been ordered in writing.

* * * * *

"ARTICLE IX. In the event of failure or probable failure of the contractor to comply with the terms of this contract or any of them, this contract may be terminated by notice in writing to the contractor without prejudice to any claim the United States may have against the contractor."

* * * * *

"(1) In the event that the contractor shall not be in default under this contract at the date of such termination, the contractor shall also

be paid a sum equivalent to ten (10) per cent of all cost (except the cost of purchased component parts, material, supplies, and the like, raw and not in process of conversion), all as allowed and determined by the contracting officer, less all fixed profits theretofore paid in accordance with Article IV. Such ten (10) per cent of cost payment is subject to addition or deduction, depending on the difference between *estimated* and *actual* cost, as may be determined in accordance with Article IV hereof."

Article XI provides for the manner of cancellation in case of termination of the war, or necessity for completion has become unnecessary.

* * * * *

"ARTICLE XIX. Except as this contract shall otherwise provide any doubts or disputes which may arise as to the meaning of anything in this contract, the matter shall be referred to the Chief of Ordnance for determination. If, however, the contractor shall feel aggrieved at any decision of the Chief of Ordnance upon such reference, he shall have the right (save only as to the allowance and determination of costs as provided for in Article V hereof) to submit the same to the Secretary of War, whose decision shall be final. But nothing in this contract contained shall be construed in prejudice of the rights and privileges, if any, of the contractor to bring an action in the Court of Claims or any other proper tribunal, nor shall anything herein be construed as the consent of the United States or any officer, to such an action or as a waiver of any rights or defenses the United States may have with respect thereto."

3. The contractor proceeded with the manufacture of shells under the foregoing contract, and it appears that at the end of August, 1918, it was in default by not having delivered the shells called for. Thereupon a formal supplemental contract dated November 1, 1918, was entered into, which, after first setting up some of the terms of the contract of December 31, 1917, provided as follows:

"ARTICLE I. All of the original contract relative to payment of the articles at a price of cost plus a fixed profit of one dollar (\$1.00), subject to addition or deduction, for each article, as set forth under Article IV on pages 9 to 17, both inclusive, beginning with the words, 'The United States will make the following payments to the contractor,' set forth on page 9, continuing through all of said page 9 and through pages 10, 11, 12, 13, 14, 16, and 17, ending with the words, 'No payments by the United States shall act to prevent the United States from later disputing the validity thereof under this contract,' set forth on page 17 of said original contract, and also as set forth under Article V on page 19 of said original contract, and also as set forth under subdivision one, Article IX, on page 24 of said original contract, be, and the same is hereby, stricken from said original contract; and all of the procurement order dated January 18, 1918, relative to payments for the articles at the price of cost plus a fixed profit of one dollar (\$1.00) for each article set forth on the first page thereof, as follows:

"4. The price to be paid you for the shell ordered herein is to be on a basis of cost estimated by you at \$8.18 per pound, plus one dollar

(\$1.00) to be paid you as profit per complete round. The United States will furnish you the following, f. o. b. your works, in connection with this order;

"be, and the same is hereby, stricken from said procurement order; and instead of the price of cost plus a fixed profit as provided in said original contract as amended by said procurement order, the United States shall pay to the contractor a fixed price of eight dollars and fifty cents (\$8.50) for each of the four million (4,000,000) complete rounds of 75-mm. high explosive shell mentioned in the original contract.

"ARTICLE II. All of the original contract relative to the raw materials furnished by the United States and the furnishing of components by the United States, set forth under Article IV, pages 18 and 19 thereof, beginning with the words 'The United States agrees to furnish to the contractor all raw materials,' set forth on page 18, continuing through all of said page 18 and through page 19, ending with the words, 'It is agreed that component parts or material furnished by the United States shall be in accordance with the requirements under the specifications,' set forth on page 19 of said original contract, and all that part of the procurement order dated January 18, 1918, relative to the United States furnishing the contractor all raw material required and certain component parts set forth on pages 1 and 2 thereof, beginning with the words, 'The United States will furnish you the following, f. o. b. your works, in connection with this order,' set forth on page 1, continuing through all of said page 1 and through page 2, ending with the words '1,500,000 shell case forgings,' set forth on page 2 of said procurement order, be, and the same are hereby, stricken from said procurement order; and instead of the United States furnishing all raw material and certain components necessary in the manufacture of the articles, the contractor shall furnish all material and all component parts necessary for the manufacture of the articles: *Provided, however,* That any materials or components furnished by the United States are to be paid for by the contractor, and the prices therefor shall be deducted from payments to be made the contractor hereunder.

"ARTICLE III. The materials and components hereinafter listed under 'schedule' for the manufacture of the articles contracted for will be furnished the contractor by the United States at the valuation stated, at such times and in such quantities as shall be deemed requisite by the Chief of Ordnance, f. o. b. as hereinafter stated, the contractor to pay any demurrage, storage, cartage, or switching charges accruing after such delivery and the value of such material and components will be deducted by the United States from its payments as hereinafter provided. The Chief of Ordnance or his duly authorized representative shall in every instance have the final decision as to the amount of material required for the manufacture of the articles contracted for.

"Upon final delivery of all of the articles herein contracted for, or upon the termination of this contract by reason of any cause whatsoever, prior to final payment of the United States for articles already manufactured or in the process of manufacture the contractor shall forward to the Chief of Ordnance a statement of the amount of such unused material left over in substantially the same condition in which

it was furnished, and shall return all unused material to the United States or dispose of the same in accordance with the directions of the Chief of Ordnance, or, at the option of the United States, the contractor may retain such unused material on such terms and conditions as may be determined by the Chief of Ordnance.

"The United States shall estimate the amount of the material and components hereinafter listed entering into each of the shells delivered to and accepted by it and shall deduct the value thereof (such value to be based on the price of said material and components hereinafter specified) from the unit price of each shell as and when payments are made for such shells.

"The United States shall have the option of substituting, at the same valuation, other and different material or components satisfactory to itself for the material or components hereinafter named.

* * * * *

"ARTICLE IV. The delivery of the four million (4,000,000) complete rounds of 75-mm. high-explosive shell contracted for shall be delivered according to the following schedule of deliveries instead of according to the deliveries specified in the said original contract:

"825,000 complete rounds, less such quantity thereof already delivered under said original contract, shall be delivered prior to December 1, 1918.

"500,000 complete rounds delivered during December, 1918.

"500,000 complete rounds delivered during January, 1919.

"500,000 complete rounds delivered during February, 1919.

"500,000 complete rounds delivered during March, 1919.

"500,000 complete rounds delivered during April, 1919.

"500,000 complete rounds delivered during May, 1919.

"175,000 complete rounds delivered during June, 1919.

"All deliveries shall be completed prior to July 1, 1919.

"ARTICLE V. All scrap resulting from the manufacture of the shells and parts thereof contracted for, except crop ends of steel, shall be the property of the contractor.

"ARTICLE VI. Except as herein modified, all the terms and conditions of the original contract, dated December 31, 1917, shall remain in full force and effect.

"ARTICLE VII. The contractor hereby releases the United States from all claims and demands arising out of any alleged faults or failures upon the part of the United States in furnishing components, etc."

* * * * *

4. On the 1st day of February, 1919, a second supplemental formally executed contract was entered into between the claimant and the United States Government which, after setting out in the preamble portions of the contract dated December 31, 1917, and the amendment dated November 1, 1918, provided—

"ARTICLE I. The contractor shall deliver and the United States shall accept the following specified quantity of the articles contracted for at the price provided in the original contract as amended, payment of which price shall be accepted by the said contractor in full satisfaction of any and all claims arising out of the said original contract as hereby amended. Of the 4,000,000 complete rounds of

75-mm. shell provided for in the said original contract, the contractor shall deliver only 2,500,000.

"ARTICLE II. The United States shall pay to the contractor the cost of all materials and components completed and accepted, or in process, in excess of the materials and components required for the completion of the said 2,500,000 complete rounds purchased by the contractor for the performance of the said contract, and now on hand and not paid for by the United States in an amount not exceeding the requirements for the completion of the said contract, provided the same comply with the specifications; and to the cost of said materials and components there shall be added 10 per cent of such cost to cover all other expenses and charges in connection with the said excess materials and components.

"It is understood and agreed that in determining the cost of materials and components for which payment is to be made by the United States under the provisions of this section no allowance shall be made for depreciation to the contractor's plant or for obsolescence thereof, or for any other expense, except the actual amount paid by the said contractor for materials, labor, and overhead expense.

"Title to all such materials and components paid for by the United States under this article shall immediately, upon such payment, vest in the United States, and the contractor shall hold the same as the property of the United States and make such disposition thereof as directed by the Chief of Ordnance.

"ARTICLE III. The contractor shall immediately without further notice (any notice required to be given to the contractor pursuant to the terms of said contract being hereby expressly waived by the contractor) discontinue all operations in its shell-forging plant and in its brass-case drawing plant, and all operations on all completed components in excess of those required for the said 2,500,000 complete rounds. The contractor and its subcontractor shall also, on or before January 31, 1919, discontinue all machining operations on steel shell components and on booster and adapter components. Said operations to be discontinued immediately upon the completion of sufficient of said components to complete 2,500,000 complete rounds, and in any event to terminate not later than January 31, 1919.

"ARTICLE IV. The United States shall furnish to the contractor, and the contractor shall accept., f. o. b. Kenilworth, New Jersey, sufficient completely machined and copper banded steel shell bodies, booster, and adapter parts as may be necessary to complete the delivery of the said 2,500,000 complete rounds, and which said components will be charged to the contractor at the following prices, and the price to be paid by the United States for the said 2,500,000 complete rounds shall be reduced by an amount to the total price of the said components furnished by the United States:

	Each.
Shell bodies-----	\$2. 97
Boosters-----	. 15
Adapters-----	. 20

The said prices for the said components shall include the cost of materials entering into the said components. The said components shall be immediately shipped to the contractor at its plant at Kenilworth, New Jersey.

"All components furnished by the United States shall be in accordance with the requirements under the specifications, and any work done on steel shell components furnished by the United States and found to be defective shall be paid for by the United States at the actual cost of such work.

* * * * *

"ARTICLE VIII. The United States shall pay to the contractor the actual cost plus 10 per cent of such cost for all rounds or components used by the United States for proof purposes.

"ARTICLE IX. Except as herein modified, all the terms and conditions of the original contract dated December 31, 1917, as amended, shall remain in full force and effect."

5. There was a further supplemental formal contract entered into between the Government and the claimant on the 21st day of June, 1919, which was not offered in evidence and which is immaterial to the matters in dispute.

6. Claimant was granted a hearing before this Board on December 29 and 30, 1920, and, in addition thereto, the transcript of the evidence produced by it before the Ordnance Claims Board is before this Board and has been considered by it. The position taken by the claimant at the hearing before this Board is slightly different from that it has assumed in its brief; and, taking for granted that the brief sets forth the final contentions on which it has noted its appeal and is asking reimbursement, we therefore adopt the following portion of same as an accurate statement of its claim:

"From time to time during the carrying out of this contract by claimant the Government, pursuant to Articles I and VII of Claimant's Exhibit A, made various changes in the drawings and specifications attached to Claimant's Exhibit A, and further caused claimant to perform additional work not required under the original contract, Claimant's Exhibit A. The following were the changes in the drawings and specifications and additional requirements of the Government:

"1. Delivery to claimant of steel not complying with the specifications.

"2. Segregation of steel and forgings by heats and codes.

"3. Necessity of code marking shell bodies with steel stencils or dies.

"4. Change in base thickness of forgings.

"5. Rust-proofing adaptors.

"6. Changing claimant's method of assembling base covers.

"7. Changing requirement of the claimant to nose in shell before heat treatment.

"In addition to the foregoing, claimant was compelled to attempt to perfect a process for the manufacture of tapered wall booster which would not infringe a patent therefor, which neither claimant nor the Government owned, or under which neither had a license. When the attempt to perfect such process for the manufacture of tapered wall-type booster casings in commercial quantities became impossible, claimant obtained permission from the Government to attempt to develop an acceptable straight wall-type booster.

"By reason of all the foregoing, claimant was delayed in the prosecution of its work and its operations were extended over a greater period of time than would have been necessary to complete the contract under conditions contemplated under the original specifications.

"Claimant claims, pursuant to Articles VII and XI of Claimant's Exhibit A, pages 20, 21, and 28, remuneration for all expenditures caused by the foregoing conditions, and in addition thereto ten per cent of such an amount as may properly be awarded to it."

Claimant's Exhibit A referred to is a copy of the original contract dated December 31, 1917.

DECISION.

1. As is seen from the foregoing quotation from claimant's brief, it is basing its claim for compensation under the provisions of Articles I, VII, and XI of the original contract, so that it becomes necessary for this Board to refer specifically in this decision to the said articles.

2. The original contract, G781-430A, dated December 31, 1917, was an informal cost-plus contract, under the provisions of which the claimant proceeded to manufacture the shells called for on or until about the 1st day of November, 1918, when the said contract was amended by a formally executed supplement dated November 1, 1918, changing the said informal or proxy signed contract from a cost-plus to a unit price.

3. Article I of the said supplemental contract specifically strikes from the said original contract Article IV, on pages 9 to 17, both inclusive, and Article V, on page 19, and Article IX, on page 24, of the contract of December 31, 1917, in the following language:

"ARTICLE II. All of the original contract relative to the raw materials furnished by the United States and the furnishing of components by the United States, set forth under Article IV, pages 18 and 19 thereof, beginning with the words, 'The United States agrees to furnish to the contractor all raw materials,' set forth on page 18, continuing through all of said page 18 and through page 19, ending with the words, 'It is agreed that component parts or material furnished by the United States shall be in accordance with the requirements under the specifications,' set forth on page 19 of said original contract, and all that part of the procurement order dated January 18, 1918, relative to the United States furnishing to the contractor all raw material required and certain component parts set forth on pages 1 and 2 thereof, beginning with the words 'The United States will furnish you the following, f. o. b. your works, in connection with this order,' set forth on page 1, continuing through all of said page 1 and through page 2, ending with the words '1,500,000 shell case forgings,' set forth on page 2 of said procurement order, be, and the same are hereby, stricken from said procurement order, and instead of the United States furnishing all raw material and certain components necessary in the manufacture of the articles the contractor

shall furnish all material and all component parts necessary for the manufacture of the articles: *Provided, however, That any materials or components furnished by the United States are to be paid for by the contractor, and the prices therefor shall be deducted from payments to be made the contractor hereunder.*"

Article I of original contract, relied on by the claimant, is as follows:

"The contractor agrees to manufacture and deliver to the United States 4,000,000 complete rounds of 75-mm. high-explosive shell, hereinafter called the articles, each of the articles being referred to as a unit or round, in accordance with the drawings and specifications hereto attached and made a part hereof, marked 'Schedule I,' *and such changes as may be made therein as hereinafter provided, and the United States agrees to pay therefor, all upon the terms and conditions in this contract set forth.*" (Italics ours.)

Article VII of the original contract states—

"It is agreed that the contracting officer may, by written notice to the contractor at any time, make changes in the drawings and specifications or supplemental or substituted drawings and specifications which form a part of or are added to this contract. *If such changes involve substantially additional work for the contractor's manufacturing organization or labor and material, a fair addition shall be made to the fixed profits * * *.*" (Italics ours.)

4. The formal supplemental contract of November 1, 1918, by changing the original contract from a cost plus to a unit price thereby makes it impossible for the language of Article I, "and the United States agrees to pay therefor, all upon the terms and conditions in this contract set forth" to apply, because the said supplement specifically strikes from the said contract of December 31, 1917, all of the articles as to payment and substitutes in lieu thereof an entirely different method of payment, and by changing the said contract from a cost plus to a unit price makes it impossible to either take from or add to the "*fixed profits*," as the fixed profits have been definitely wiped out by the formally executed subsequent agreement of the parties of November 1, and there has been substituted in lieu thereof an entirely different agreement, which must govern. Any right that the claimant may have had under Articles I or VII as to any payment on account of work done in complying with changes provided for in the said original contract of December 31, 1917, have been stricken out and eliminated by the subsequent formal unit price and the same, owing to the certain language used therein and the admission of the claimant that such was the intention (Tr., 113), must be read as if the same were dated the 31st day of December, 1917, for the parties have solemnly agreed that the unit price should apply to each of the 4,000,000 rounds contracted for. The Board is therefore

of the opinion that the claimant is entitled to no reimbursement by

reason of any expenditures that it may have made under the provisions of Articles I or VII of the original contract.

5. Article XI of the original contract of December 1, relied on by the claimant as entitling it to remuneration for all expenditures it alleged it had to make on account of changes in specifications, and 10 per cent of such amount as provided, has been wiped out by the formally executed supplement. Articles I and II of the formally executed supplement of February 1, 1919, being a settlement contract and containing a release to the Government, precludes this Board from recommending any payment to the claimant by reason of any construction that could possibly be placed upon any of the provisions of Article XI of the original contract.

6. The claimant not only solemnly provided in Article II of the supplemental contract of November 1, 1918, that the provisions of Article I of the original contract of December 31, 1917, as to the materials to be supplied by the Government complying with the specifications should be stricken out but has, in Article VII of the supplemental contract of November 1 agreed—

“The contractor hereby releases the United States from all claims and demands arising out of any alleged faults or failures upon the part of the United States in furnishing components, etc.”—

thereby releasing the United States Government from compliance with the specifications attached to and made a part of the original contract or the supplements thereto. This Board therefore finds that the claimant is entitled to no reimbursement on account of the alleged failure of the materials supplied by the Government to comply with any of the specifications, and the Board is further of the opinion that even if the foregoing were not true that the claimant, by the use of the materials furnished it by the Government without any formal protest, has waived any right it might have had under any provisions of the original or supplemental contracts to insist that the materials comply with the specifications or in lieu thereof that it be paid any extra sums the failure of the said material to comply with specifications may have caused it to expend.

7. Taking up the claim for expense put to in the the process of the manufacture of a tapered-wall booster, the evidence shows that the claimant knew, before it entered into the contract, what kind of a booster it had to furnish and well knew that the one then most popular was controlled by the Rockwood Sprinkler Co., and should have at once made the necessary arrangements to secure this, but preferred to attempt to manufacture a suitable booster in its own plant. No provision of its contract prevented this and, even admitting that it was working under a cost-plus contract for several months, yet the contract of November 1, in changing the contract of

December 31, 1917, from a cost plus to a unit price specifically referred to each of the rounds contracted for in the following language:

"The United States shall pay to the contractor a fixed price of \$8.50 for each of the 4,000,000 completed rounds of 75-mm. high-explosive shells mentioned in the original contract."

This, therefore, carries the cost of each round of the said 4,000,000 shells back to the date of the beginning of work by the claimant as a unit-price contract in which unit price all expenditures of the claimant must be included, and claimant is entitled to no reimbursement for any sum spent by it in attempting to develop something that by the plain terms of its contract it was its duty to provide either by purchase or by manufacture, nor in our opinion is claimant entitled to any expenditures it was put to in later developing a straight-wall booster, for the evidence shows that the claimant subsequently entered into a separate and different contract for 5,000,000 of such straight-wall boosters, so that the expenditures incurred by it in this effort to develop such a booster as would be acceptable to the Government was simply in the line of the usual expenditures that would be made by any manufacturer in an effort to perfect something that it thought it could afterwards sell to the Government, or to other parties having use for the same.

8. In its final analysis, the petition of the claimant is simply an appeal to this Board to set aside, or re-form, the contracts heretofore entered into between the claimant and the Government on the ground that the said contracts contained provisions that it was not the intention of the parties executing the same to embody therein, and that it was the plain intention of the parties to provide that the claimant should be reimbursed for all expense or expenditures it was put to by reason of any change or additions to the specifications. To justify this Board, or any court of law in re-forming a contract, the evidence must conclusively show that the said contracts were entered into under mutual mistake, and such evidence must be so affirmative in character that there can be no question about the mistake complained of. The burden is on the claimant to establish such mistake by a preponderance of the evidence. In our opinion, it has failed to produce such evidence, and we believe that the contracts in question express the plain intention of the parties at the time they were entered into, and that the evidence is insufficient for this Board to attempt to re-form or to read into the said contracts anything other than is plainly expressed therein.

9. *In Hearne v. Marine Insurance Co.* (20 Wall., 488; 22 L. ed., 395) Mr. Justice Swayne, in delivering the opinion of the court and discussing the power of a court of equity to re-form a written contract for fraud or mistake, said:

"The rules which govern the exercise of this power are founded in good sense and are well settled. Where the agreement as reduced to writing omits or contains terms or stipulations contrary to the common intention of the parties, the instrument will be corrected so as to make it conform to their real intent. The parties will be placed as they would have stood if the mistake had not occurred.

"The party alleging the mistake must show exactly in what it consists, and the correction that should be made. The evidence must be such as to leave no reasonable doubt upon the mind of the court as to either of these points. The mistake must be mutual, and common to both parties to the instrument. It must appear that both have done what neither intended. A mistake on one side may be a ground for rescinding, but not for re-forming a contract."

10. Nor does the Board believe that the changes or additional instructions the claimant complains of were such changes or instructions as the contract contemplated should result in additional compensation being paid to the claimant; but even if the changes made and instructions issued as interpretations of said specifications were such changes as would have entitled claimant to additional compensation by reason thereof, it has specifically released the United States from any liability on account of such changes in Article I of the February 1 supplement.

11. On the 1st day of February, 1919, claimant and the Government entered into what is known as a second supplemental contract, Article I thereof providing as follows:

"The contractor shall deliver and the United States shall accept the following specified quantity of the articles contracted for at the price provided in the original contract as amended, *payment of which price shall be accepted by the said contractor in full satisfaction of any and all claims arising out of the said original contract as hereby amended.* Of the 4,000,000 complete rounds of 75 m/m shell provided for in the said original contract, the contractor shall deliver only 2,500,000." (Italics ours.)

12. This article is not only a complete release of all claims arising out of the said original contract and the amendments thereto, but is a settlement contract and precludes the claimant from recovering not only under items 2 to 7, inclusive, of its claim as set up in its brief, but under any other item of cost that it has set up before the Board in its hearing. Nothing could be more solemn than the declaration of the parties in Article I of the February 1, 1919, supplement, nor could a fuller or more complete release be executed. The claimant by this article solemnly agrees that the payment to it of \$8.50 for 2,500,000 shells—

* * * "shall be accepted by the said contractor in full satisfaction of any and all claims arising out of the said original contract as hereby amended."

13. The evidence shows that the claimant has completed and delivered to the United States Government the 2,500,000 shells called

for under the second supplement and has been paid the sum of \$8.50 for each shell and the authorized amount for work in progress, thereby conclusively discharging any agreement that may have existed under any of the provisions of either the original contract or the two supplements, which precludes this Board from recommending any further or additional payment to the claimant by reason of any of the said contracts or by any performance or attempted performance of the same by the claimant.

14. Not only does this Board believe all relief should be denied on the merits of this case, but is further of the opinion same should be denied on jurisdictional grounds.

15. If the only contract before this Board for consideration was the contract of December 31, 1917, which, by reason of its failure to comply with the provisions of section 3744 became an informal agreement, the Secretary of War, under the provisions of the act of March 2, 1919, and this Board acting under his direction, would have authority to adjust or settle the same on its merits, but the amendments dated November 1, 1918, and February 1, 1919, being formally executed contracts by the claimant and the proper contracting officers of the United States Government, by referring to the contract of December 31, 1917, and by the very nature of the amendments, and their positive terms, thereby embodies and takes into them as a formal contract all of the provisions of the said contract of December 31, 1917, except such portions of the same as are specifically stricken out by the said amendments. So that the only resultant contracts before this Board are formally executed contracts.

16. It is an elementary principle of law that a contract of lesser dignity—in this instance, the contract of December 31, 1917—is swallowed up and becomes merged into subsequently executed contracts of greater dignity, to wit, the formally executed amendments or supplements of November 1, 1918, and February 1, 1919.

17. This doctrine was announced in the *Symington Machine Corporation*, Case No. 2512, decided by this Board July 21, 1920, which case on appeal to the Secretary of War was by him confirmed on the 11th day of January, 1921. In that case the Board in discussing the merger of a prior contract in a subsequent contract stated:

“It is an elementary principle of the law of contracts that where there are two or more contracts relating to the same subject matter, of progressing degrees of formality, that all of the provisions of the less formal contracts are merged in the subsequent and more formal. As, for instance, the provisions of a contract not under seal are merged into the subsequent contract, with respect to the same subject matter but under seal.” (Elliott on Contracts, Vol. III, p. 141; also p. 142.)

18. In the case of *Mason v. U. S.*, 17 Wall. 67, 21 L. ed. 56, in which a contractor had a contract for the manufacture of muskets, which contract was later amended, the court said:

"A contract to manufacture and deliver a hundred thousand muskets for the United States, duly entered into but wholly unperformed, is abrogated and replaced by a new contract between the manufacturer and the Government to make and deliver a smaller number, and any claim the manufacturer might, but for the new contract, have had for the refusal of the Government to take all the muskets called for in the old contract, is extinguished by making and performing the new one."

As was said in *Rhodes v. Chesapeake, etc., Ry. Co.*, 49 W. V. 494:

"If two agreements of different dates, made between the same parties and covering the same subject matter, are inconsistent, the one earlier in date is impliedly discharged by the other." (Clark Con. 611.)

19. The claimant has completed its agreement in accordance with the amendments of November 1, 1918, and February 1, 1919, by delivering to the United States Government the material or shells therein called for and has been completely paid in accordance with the terms of the two amended contracts so that we have a contract that has been completed by performance and payment, and are therefore confronted with the proposition that where a formal contract has been completed by performance and payment the Secretary of War has lost jurisdiction to adjust or settle the same.

20. This point is comprehensively discussed by Col. Delafield in his "Notes on Jurisdiction of the Secretary of War," in the following language:

"It will be noted, however, that this power of the Secretary of War to settle formal contracts by agreement with the contractor rests wholly upon the existence of the contract itself and can not be exercised where the contract has been fully executed by performance by the contractor, or terminated by breach, expiration of the time for performance, or otherwise. In such cases the powers and functions of the Secretary of War to amend the contract have ceased and the claims of the parties are merely for payment or for damages for some breach of the contract and can only be determined in the Department of the Treasury (section 368, U. S. Compiled Statutes) or by a court having jurisdiction."

21. The Board of Contract Adjustment has consistently refused to grant claimants any relief where a formal contract, under which they were claiming, has been completed by performance and payment. In the case of the *National Manufacturing Corporation*, Case No. 1485, page 10, Volume IV, part 1, the Board of Contract Adjustment held:

"Where a formally executed contract of the War Department had been terminated, and no question remains but the adjustment of

unliquidated damages claimed for under such formal contract, the jurisdiction and power to make such adjustment is exclusively in the Department of the Treasury (Rev. Stat. U. S., 236) or in the courts having jurisdiction."

The same doctrine was adhered to in the cases of *Maley & Kelley Contracting Co.* (Case No. 1473, Vol. IV, part 2, page 164; *Buffkin & Girvin*, Case No. 2028, Vol. IV, part 2, page 428; *G. M. Self*, Case No. 2462, page 218, Vol. IV, part 3).

22. The Secretary of War is therefore without jurisdiction to make any adjustment of the matters that the claimant here presents. Any rights the claimant may have under this contract can only be determined by the Secretary of Treasury (see 368 U. S. Compiled Stats.) or by a court having competent jurisdiction.

23. For the foregoing reasons all relief asked for by the claimant is denied.

DISPOSITION.

A final order denying relief will issue.

Lieut. Col. McKeeby and Capt. Sheppard concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

JANUARY 28, 1921.

Case No. 2667.

In re **CLAIM OF THE AUTOYRE CO.**

(ON APPEAL BEFORE THE SECRETARY OF WAR.

The Appeal Section, War Department Claims Board, rendered a decision in this case July 22, 1920, denying relief. Claimant requested a rehearing, which was granted, and on October 14, 1920, the Appeal Section rendered another decision confirming its former decision.

Claimant appealed to the Secretary of War, who, on January 28, 1921, vacated the decision of the Appeal Section and directed that an award be made and entered by the Appeal Section, War Department Claims Board. (See Vol. VII, p. 93, and Vol. VII, p. 925.)

Upon consideration of the appeal and record in the above-named case I am convinced that the decision of the Appeal Section heretofore made is erroneous and it is hereby vacated.

An examination of the record shows that the United States, under the Dent Act, and the conduct of the officers of the Ordnance Department, is required to reimburse claimant for balance due for increased facilities, and an award accordingly will be made and entered by the Appeal Section, War Department Claims Board.

NEWTON D. BAKER,
Secretary of War.

FEBRUARY 4, 1921.

Case No. 2667.

***In re* CLAIM OF AUTOYRE CO.**

(See decision of Secretary of War, Vol. VIII, p. 585.)

Capt. Taylor writing the opinion of the Board.

DECISION REVERSING FORMER DECISION.

FINDINGS OF FACT.

The Appeal Section finds the following to be the facts:

1. This claim is presented under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, 1919, for \$4,052.67, by reason of an agreement alleged to have been entered into between claimant and the United States.

2. During the summer and fall of 1918 claimant had a number of subcontracts with Gray & Davis, of Boston, Mass.; the American Standard Metal Products Co., of Paulsboro, N. J.; the Davis Sewing Machine Co., of Dayton, Ohio; the Sterling Motor Co., of Brockton, Mass.; and the American Multigraph Co., Cleveland, Ohio, all of which companies had contracts with the Ordnance Department for the manufacture of Mark IV fuzes, etc. Claimant had contracts with these companies to furnish safety casings for the fuzes. The one with the American Multigraph Co., dated October 2, 1918, was for 500,000 safety casings for fuzes at \$16 per thousand, or a total of \$8,000. Claimant was unable to produce casings in sufficient quantities. Maj. B. A. Franklin, chief of the Bridgeport district ordnance office, and other officers and representatives of that office, repeatedly requested and urged claimant to purchase additional machinery and other equipment so as to enable it to increase its production. Claimant complied with this request, and purchased additional machinery and equipment to the amount of about \$12,000.

3. Shortly after the armistice claimant was requested to suspend production on all of its subcontracts, and this request was complied with. Only 93,000 safety casings had been manufactured on the order of the American Multigraph Co. for 500,000 cases.

4. The Bridgeport district ordnance board proceeded to audit the accounts and books of claimant, and as the result of this audit prorated among the six prime contractors to whom claimant bore the relation of subcontractor the cost of machinery and tools which claimant had secured under the circumstances recited above. The prime contractors then made claim against the Government for the respective items so prorated as commitments in favor of claimant. The item prorated to the American Multigraph Co. totaled \$6,811.86. These items were considered by the Cleveland district ordnance board, which was charged with the settlement of the claim of the American Multigraph Co. Investigation showed that most of the special facilities included in the claim were not necessary for the performance of the contract which claimant had with the American Multigraph Co. It also appeared that if claim were allowed in full the claimant would be paid more than if it had performed the contract by furnishing all of the 500,000 casings. Accordingly, the Cleveland board reduced the claim for special facilities. The total amount awarded to claimant was \$2,902.85, of which amount \$1,034.61 was to cover the cost of the special facilities applicable to the contract claimant had with the American Multigraph Co. All of the claims filed with the Bridgeport district ordnance board were approved by that board and have been settled. Consequently, the amount expended by claimant for special facilities which has not been adjusted is the amount of its claim against the American Multigraph Co., \$6,811.86, less the amount allowed by the Cleveland district claims board, to wit, \$2,902.85, which makes a balance still unsettled of \$3,909.01.

5. After the claim against the American Multigraph Co. had been reduced by the Cleveland district claims board, claimant filed this claim as a class B claim under the act of March 2, 1919. The amount asked for is \$4,052.67.

6. The Board of Contract Adjustment in a decision dated October 14, 1920, denied claimant any relief, holding that there was no agreement within the purview of the act of March 2, 1919. Claimant thereupon appealed to the Secretary of War. The Secretary of War reviewed the record, and on January 28, 1921, issued the following order:

“Upon consideration of the appeal and record in the above-named case, I am convinced that the decision of the Appeal Section heretofore made is erroneous, and it is hereby vacated.

“An examination of the record shows that the United States, under the Dent Act, and the conduct of the officers of the Ordnance Department, is required to reimburse claimant for balance due for increased facilities, and an award accordingly will be made and entered by the Appeal Section, War Department Claims Board.”

DECISION.

1. In accordance with the order of the Secretary of War above quoted, the Appeal Section finds that an informal agreement was entered into between claimant and the United States by B. A. Franklin, lieutenant colonel, Ordnance Department, on or about October 1, 1918, by the terms of which claimant was to purchase and install additional facilities to be used in the manufacture of safety casings for Mark IV fuses; the claimant did purchase and install said machinery and equipment at a cost of approximately \$12,000. Due to the termination of the war and the suspension of production of Mark IV fuses on Government contracts, claimant was unable to amortize the cost of the special facilities purchased as above recited, and there is, therefore, an implied obligation upon the United States to reimburse claimant the cost of said special facilities. Reimbursement has been made in part, but there still remains the sum of \$3,909.01, for which claimant has not been reimbursed.

DISPOSITION.

The Appeal Section will make a statutory award in accordance with this decision.

Lieut. Col. McKeeby and Capt. Woodfin concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

FEBRUARY 11, 1921.

Case No. 3059.

In re **CLAIM OF NEWARK RUBBER CO.**

- 1. IMPLIED AGREEMENT.**—Statements made by a procurement officer to a contractor that the United States Government was badly in need of raincoats and that claimant would be given contracts does not create any agreement, express or implied, that authorizes the Secretary of War to pay to claimant any expenditures made by it in equipping a factory for the purpose of making raincoats, especially in view of the fact that claimant was at the time engaged in the manufacture of raincoats for the Government and after the equipment of the factory received additional contracts.
- 2. JURISDICTION—FRAUD.**—Whenever a claim is presented to the Secretary of War for adjustment and the evidence shows that the same is tainted with fraud, or a suspicion of fraud, the Secretary of War is entirely within his rights in refusing to take jurisdiction of the same for the purpose of deciding it upon its merits.

Maj. Farr writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is a class B claim in the sum of \$50,000 and was forwarded to this Board on the 8th day of January, 1921, by the War Department Claims Board on the theory that the verbal agreement alleged by the claimant created a class B claim and was therefore within the jurisdiction of this section.

2. Claimant was a raincoat manufacturer and had various contracts with the United States Government. In the late fall of 1917 one of its factories was destroyed by fire, and Mr. Edward P. Gwillim, secretary and treasurer of claimant company, came to Washington for the purpose of arranging for additional contracts, and alleges that at that time he was told by Capt. Aubrey W. Vaughn that his company would be given sufficient contracts to keep its factories busy and that the Government needed a great many more raincoats than all the manufacturers could supply; that on the faith of this conversation claimant purchased and equipped a factory at Garfield, N. J., at a cost of over \$100,000.

3. Claimant further alleges that after it had started and nearly completed the installation of the machinery in its rubberizing plant at Garfield, N. J., its Mr. Edward P. Gwillim, on or about the 28th day of March, 1918, came to Washington, and during a conference

with Capt. Vaughn was advised by him that the War Department had changed its method of letting contracts and that the same would be let by bid, and that Capt. Vaughn advised him that he considered \$5.25 for the light and \$5.75 for the heavy as a fair price, and that if the contractors bid too low they would not get any business, because they would not be considered reliable, and that the said Mr. Gwillim, believing something was wrong, submitted a bid at a less price than suggested by Capt. Vaughn, but that when the bids were opened claimant found that it, along with a great many other manufacturers, had bid higher than certain large manufacturers of raincoats, and that the large manufacturers having the lowest bids were given contracts, but that the claimant company was given none, though its secretary stated at that time that it would take contracts for the same figure as had been awarded to the large manufacturers, and that its Mr. Gwillim then and there protested the unfair treatment it had received and immediately started an investigation, the result of which was that Capt. Vaughn was finally indicted for fraud in the letting of the various raincoat contracts.

4. Thereafter, on the 21st day of May, 1918, claimant company received a proxy signed contract, No. 3379-N, for the manufacture of 30,000 heavy-weight coats and 15,000 light-weight coats, at a total contract price of \$243,450, which claimant alleges was sufficient only for a few weeks' run of its factory (Tr. p. 27), and which would not have necessitated the erection of the factory at Garfield, N. J. The record establishes the fact that claimant proceeded to the execution of the contract in question and that thereafter some one connected with claimant's factories paid to a Government inspector by the name of Fuller certain sums of money that were alleged to have been paid for the purpose of passing raincoats that did not comply with specifications. On the 20th day of August, 1918, claimant was advised by the contract branch of the Clothing and Equipment Division of the Quartermaster Corps that the raincoat contract No. 3379-N was canceled and terminated in accordance with directions of the Secretary of War.

5. On September 7, 1918, Army Compulsory Order 722-BC (4648-M) was issued to the contractor to replace the original contract. This order was terminated by the acceptance by the contractor of award 1330, dated October 27, 1919, in the amount of \$12,310.27, which award was made by the War Department Board of Appraisers and was in full settlement of any claim then existing or of any that might thereafter arise as a result of the termination of the aforementioned order.

6. On the 30th day of June, 1919, the claimant filed with the War Department Claims Board a claim in the sum of \$101,660.13, on which claim the War Department Claims Board issued a certificate "C"

that was later recalled and canceled, and the settlement hereinbefore referred to in paragraph 5 was made by the Board of Appraisers and accepted by the contractor in settlement of any claim arising out of the termination or suspension of the said compulsory order, and from a careful examination of the files it does not appear that the claim now presented before this Board has ever been directly passed upon by any other board.

7. In the claim filed before the War Department Claims Board on the 30th day of June, 1919, the claimant attached to his claim a copy of a letter alleged to have been written on the 25th day of June, 1919, in which claimant asked for damages caused by the Government compelling it to vacate its premises on Ninth Street, New York, which building it alleges was taken over by the Government for hospital purposes, and in the closing paragraph of its letter refers to the Garfield, N. J., factory and alleges in said letter that it had spent approximately \$100,000 in completing the said factory, and closing the said letter by stating that the Government could have the same for what it had cost it or that it would ask that the Government allow it \$50,000 damages. The Board of Appraisers did not pass upon the last contention of the claimant and only dealt with the amount that should be allowed it by reason of the termination of the compulsory order, No. 722, of September 7, 1918.

8. On the 2d day of December, 1918, Mr. Edward P. Gwillim, the secretary and treasurer of claimant company, was indicted in the Rhode Island district for violation of sections 37 and 39 of the Criminal Code "Bribing a Federal officer and conspiracy to bribe a Federal officer," and the said indictment was disposed of on Monday, February 23, 1920, upon his plea of "nolo," and the court fined Mr. Gwillim \$1,000.

9. Claimant was granted a hearing by the Board on Monday, the 31st day of January, 1921, at which time its Mr. Gwillim appeared without counsel. His presentation consisted chiefly of an hysterical statement of the wrongs that he alleged had been done him, together with the allegation that the factory in question was purchased and equipped on the promise of Capt. Vaughn to give claimant company further and additional work sufficient to keep it busy during the progress of the war, and the further allegation that Capt. Vaughn stated to him prior to May 24, 1918, and prior to the purchase and equipment of the factory in question that the United States Government needed more raincoats than all the raincoat factories could turn out.

10. The claim here presented is not for any damage claimant alleges resulted to it by reason of the cancellation of Contract No. 3379, because claimant specifically stated at the hearing before this Board that he was not claiming under the said contract (Tr. 38).

but is based entirely upon the promises alleged to have been made claimant by Capt. Vaughn that it would be given contracts to keep its factories busy.

DECISION.

1. Taking the most favorable view of the evidence presented by the claimant, as to statements made to its secretary and treasurer, Mr. Gwillim, and admitting for the sake of argument only that the same is true, it is the opinion of this Board that the language attributed to Capt. Vaughn, even if used by him, created no contractual obligation between the claimant and the United States Government, nor establishes any agreement, express or implied, that would justify this Board in recommending any reimbursement to the claimant by reason of any expenditures that may have been made by it in the alteration or equipment of the factory at Garfield, N. J.

2. Not only does this Board believe that all relief should be denied on the merits of this case, but is further of the opinion that, as Mr. Gwillim, secretary and treasurer of the claimant company, has been fined by a Federal court of competent jurisdiction for alleged fraud in the performance of raincoat contracts between claimant company and the United States Government, and the claim here presented is so closely allied with the contract in the performance of which he was accused of, and convicted of bribery of the Government raincoat inspector, charged with the proper inspection of raincoats made under said contract, good administration demands that the Secretary of War should refuse to enter into any negotiations with claimant for the purpose of attempting to decide the said claim on its merits, but should leave claimant to pursue any remedy it may be advised it has in the Court of Claims, where such matters are properly cognizable.

3. For the foregoing reasons all relief asked for by the claimant is denied.

DISPOSITION.

A final order denying relief will issue.

Lieut. Col. McKeeby and Capt. Sheppard concurring for the Appeal Section; Mr. Van Fossan concurring for the War Department Claims Board.

FEBRUARY 12, 1921.

Case No. 553.

In re **CLAIM OF ST. LOUIS TIN & SHEET METAL WORKING CO.**

1. CLAIM AND DECISION.—Claim, as amended, is for \$13,223.51, and is presented as a class B claim under the act of March 2, 1919. Claim was decided by the Board of Contract Adjustment on March 15, 1920. On appeal the Secretary of War reversed that decision and ordered another hearing. On October 4, 1920, the Appeal Section entered a decision again denying relief. Claimant asked for reconsideration of that decision, which was granted. Held, it is unnecessary to decide whether or not the material in question was purchased upon the faith of an informal agreement, as the proof shows that claimant used the material in its commercial business and suffered no loss thereon. Claimant is not entitled to reimbursement for prospective or possible profits it might have made if it had bought material on the market at less than the price paid for the material in question. The true test is, Did the contractor sustain a loss on the entire transaction? (For former decision, see Vol. IV, p. 104, and Vol. VII, p. 813.)

Capt. Taylor writing the opinion of the Board.

ON RECONSIDERATION.

The Appeal Section finds the following to be the facts:

1. This claim was filed on June 20, 1919, as a class B claim under the act of March 2, 1919. On February 25, 1920, a hearing was held on the claim before the Board of Contract Adjustment, and on March 15, 1920, a decision was rendered denying claimant any relief. That decision was based on two grounds, viz, (1) that there was no agreement within the purview of the act of March 2, 1919, and (2) that no loss had been sustained by claimant.

Claimant appealed from that decision to the Secretary of War, who, on September 1, 1920, ordered—

“that the decision of the Board of Contract Adjustment be set aside and that the entire claim be reconsidered in the light of the accompanying recommendations of the special advisors, claimant to be allowed to show, if it can, what loss it actually sustained.”

The recommendation of one of the special advisors is as follows:

“I recommend that the decision of the Board be reversed and the case remanded with instructions to grant a rehearing and an

opportunity for claimant to show, if it can, what losses it actually sustained."

The recommendation of the other special advisor is as follows:

"I recommend that the Board be left free to make such findings as the entire evidence shall require with regard to the terms of such agreement as was entered into. In case an agreement is found, it is, of course, plain that claimant is not entitled to compensation for losses on material purchased unless such purchases were made in reliance on the agreement, were reasonable in amount, and were made within a reasonable time after the conversation which is relied upon as the authority for such purchase, taking into account all the surrounding circumstances."

2. Pursuant to the foregoing order of the Secretary of War and the recommendations of the special advisors, a second hearing was had on this claim on September 22, 1920, and on October 4, 1920, the Appeal Section rendered another decision in which relief was again denied. Claimant has asked that that decision be reconsidered on the ground that it does not conform to the order of the Secretary of War and the recommendations of the special advisors. A further hearing was, therefore, granted claimant and additional testimony was taken on January 19, 1921. The only witness heard at this time was Mr. Walter S. Grant, assistant secretary and treasurer of claimant company.

3. The claim as originally filed was for \$11,975.94, which represents the alleged loss on:

1,714 pkgs. 17 by 24½ inches, 90 pounds black plate at \$5.65 per cwt.	}	\$26, 732. 80
1,720 pkgs. 18½ by 24½ inches, 90 pounds black plate at \$5.65 per cwt.		
16,690 pounds solder, at 39.5 cents per pound		6, 592. 55
Freight on plate		1, 802. 73

also expense of hauling and unloading, insurance, storage, and carrying charges for one month. At the hearing on September 22, 1920, the claimant added \$1,247.57 as additional carrying charges for seven months, making the present amount of the claim \$13,223.51.

4. The claim is for losses on tin plate and solder purchased in excess of the quantity necessary to fill the written orders for hard bread cans. Claimant alleges that this excess material was purchased upon the faith of an informal agreement entered into between it and Lieut. D. E. Graham, of the Subsistence Division, office of the Director of Purchase, on or about June 12, 1918.

The evidence shows that as a result of the very great demand for hard bread cans for our forces in France during the spring of 1918 a conference of tin can manufacturers was held at the Sherman Hotel, in Chicago, on or about June 12, 1918. This conference was called at the request of Lieut. Graham, who had instructions from his superior officers to do so. Mr. C. F. Blanke, president of the

claimant company, attended this conference. Lieut. Graham stated to the representatives present that the demand for hard bread cans was practically unlimited, and that they were to purchase automatic machinery and commence manufacture of cans immediately, and that written orders covering their output would follow.

Acting upon the above instructions, claimant purchased and installed automatic machinery as quickly as possible, placed large orders for tin plate cut to Government sizes, and also placed orders for solder in large quantities. Claimant received the following orders and contracts from the Government:

	Cans.
Purchase order No. 8447, dated July 1, 1918-----	100,000
Contract No. 1371, dated Sept. 18, 1918-----	750,000
Contract No. 1591, dated Sept. 30, 1918-----	750,000
Informal purchase order No. 1873, dated Nov. 1, 1918-----	1,250,000
Total -----	2,850,000

5. Purchase order No. 8447 was completed about September 26, 1918. Delivery on contract No. 1371 was to begin on September 19, 1918, and was to be completed October 23, 1918. Due to inability to get machinery in operation on time, delivery on this contract did not begin until September 27 and was not completed until November 6. Delivery on contract No. 1591 was to have begun on September 30 and was to have been completed November 6. Due to the reasons above stated, delivery on this contract did not begin until November 6 and it was suspended about November 15, at which time only 316,400 cans had been manufactured. Claimant did not get into full production until about November 1. The capacity from about November 1 until November 15 was 25,000 cans per day if only a day shift were employed or 50,000 cans per day if a day and night shift were employed. The total number of cans delivered on all orders was 1,176,043. No deliveries were made on purchase orders No. PO-1873. The production on the uncompleted portion of contract 1591 and on all of contract No. PO-1873 was suspended at the request of the United States. Claimant has been reimbursed for the raw material on hand, material in process, etc., not in excess of the amount required to fill the specific contracts above mentioned and also for the unamortized portion of the machinery purchased for the manufacture of hard bread cans:

6. The proof shows that when the settlement agreement on the above suspended orders was entered into as of February 1, 1919, the price of tin plate had dropped from \$5.65 per hundredweight, the price paid by claimant, to about \$5 per hundredweight and that solder had dropped from 39.5 cents per pound to 29.62 cents per pound. The market price of tin plate may have fallen to \$4.75 per hundredweight for a short time shortly after the armistice. The

settlement agreement allowed claimant $33\frac{1}{2}$ per cent loss on the tin plate and 25 per cent loss on the solder. The allowance for loss on the tin plate took into consideration the scrap which would have necessarily resulted from cutting the Government tin, which was of unusual size, into sizes for commercial cans.

7. Claimant insists that it should be reimbursed for this excess material upon the same basis as it was reimbursed for the material applicable to the written orders.

The proof shows that the tin plate, for loss on which this claim is based, was ordered by claimant from the Weirton Steel Co. on September 30, 1918. On November 16, 1918, claimant wrote the Weirton Steel Co., in substance, that owing to the fact that the Government had suspended its orders for hard bread cans it was overstocked on tin plate cut to Government size, and requested that the tin plate on the order in question be cut to commercial size, viz, $18\frac{1}{2}$ by $24\frac{1}{2}$ inches and 17 by $24\frac{1}{2}$ inches, and that it be finished in "full finish" black plate; to which the Weirton Steel Co. replied on November 18, 1918, in substance, that as the tin had merely been rolled they would be glad to comply with claimant's request. This was accordingly done, and claimant used the material in its commercial business. Mr. C. F. Blanke, at the hearing on February 25, 1920, testified that the material in question was manufactured into commercial cans during 1919, which his company sold at the market price, and that his company suffered no loss, but insisted that if his company had not been stocked up with this material it could have purchased tin plate at the market price during that period, which during a part of the time was lower than what his company paid for this plate. (Transcript hearing, Feb. 25, 1920, pp. 11-12.)

Mr. Walter S. Grant testified at the hearing on September 22, 1920, that his company was actually unable to use the tin plate in question in its commercial business without considerable waste in cutting. He was unable to say what the waste amounted to, but was of the opinion that it was about the same as in the case of Government sizes when cut to commercial sizes, the only difference being that by letting it come in black plate it was possible to use it much sooner than if it had come in tin plate.

8. At the hearing on January 19, 1921, Mr. Grant testified, in substance, that the commercial cans manufactured from the excess plate were sold at \$43.50 per 1,000 and that the cost thereof was \$46.74 per 1,000, making the loss \$3.24 per 1,000, and that on this basis the actual loss on the excess plate was \$4,916.67. However, on this basis of calculation there is no allowance for profit on labor or other material that went into the cans. He further stated that the selling price of commercial cans manufactured out of the plate in question was determined by estimating the cost thereof on the basis of the price

of commercial plate in 1919 and adding a profit of $7\frac{1}{2}$ per cent. He further testified that his company did not keep records showing the actual cost of work performed, but that in determining the cost per 1,000 cans the cost of labor and overhead was estimated and added to the cost of the material. Mr. Grant was not able to give the figures used in arriving at the estimated cost of the cans manufactured out of the excess material. He was therefore requested to furnish a statement showing the items of cost used in arriving at the estimated cost of the cans made from this plate. This request has been complied with.

This statement shows the estimated cost of commercial cans on the basis of the price of commercial plate prevailing in 1919 (\$5 per 100 pounds), which is as follows:

Plate plus freight-----	\$16. 37
Labor and other material-----	5. 58
Overhead expense (85 per cent of material and labor cost)-----	18. 64
Total cost -----	40. 59
Profit -----	2. 91
Selling price per 1,000 cans-----	43. 50

The following is the estimated cost per 1,000 cans manufactured out of the excess plate:

Plate plus freight-----	\$19. 11
Carrying charge (being the additional cost of plate on account of holding same six months longer than average)-----	. 78
Labor and other material-----	5. 73
Overhead (85 per cent of material and labor cost)-----	21. 78

Total cost per 1,000 cans that were made out of Government plate-- 47. 40

On this basis of calculating the estimated cost of the commercial cans manufactured out of the excess plate it is quite clear that claimant did sustain a loss on the excess plate. In other words, according to Mr. Grant, the cans cost \$47.40 per 1,000, and claimant sold the cans at \$43.50 per 1,000, which makes the alleged loss \$3.90 per 1,000. The excess plate in question was sufficient to manufacture 2,200,000 hard bread cans, and claimant represents that 1,513,000 commercial cans were manufactured out of this plate.

9. The above basis of calculating the estimated cost of cans per 1,000 is not the correct basis. The error is in basing the overhead expense on the cost of material and labor. Claimant fixes overhead cost at 85 per cent of material and labor cost. The true basis of calculating overhead is on the basis of its relation to labor cost. Claimant has furnished a statement showing the cost of manufacture and profit earned from operations for the year ending November 30, 1919, prepared by a firm of public accountants. This statement shows that the total labor cost for 1919 was \$155,465.26 and that the total overhead expense was \$413,793.73. According to these figures

the overhead expense was 266 per cent of the labor cost. Taking claimant's figures as to the cost of the commercial cans manufactured out of the excess plate and the cost of labor which went into these cans and fixing overhead expense at 266 per cent of the labor cost, we get the following figures:

Plate plus freight.....	\$19.11
Carrying charges .....	.78
Labor and other material.....	5.73
Overhead (266 per cent of \$5.73)	15.24
Total	40.86

Undoubtedly the above is the correct method of determining the actual cost per 1,000 cans manufactured out of the excess plate in question. As claimant sold the cans at \$43.50 per 1,000, no loss was sustained, but on the other hand there was a substantial profit.

The above method of determining the overhead cost is the method which has been uniformly applied by the War Department Claims Board and the various bureau boards in the adjustment of claims against the War Department and is the method approved and employed by public accountants generally. The method employed by claimant by which overhead cost is based on the cost of material plus cost of labor is contrary to established usage and practice and contrary to the method adopted by the War Department.

10. Mr. Grant admitted that the excess solder was used in claimant's commercial business, and that the cans it went into were sold at a profit, but insisted that the profits would have been greater if solder had been purchased at the price prevailing in 1919. •

DECISION.

1. In the opinion of the Appeal Section it is unnecessary to determine whether or not the excess material involved in this claim was purchased by claimant upon the faith of the agreement entered into with Lieut. Graham on June 12, 1918. There was an agreement entered into between claimant and Lieut. Graham at that time. By the terms of this agreement claimant was to purchase machinery for the purpose of manufacturing hard bread cans. There was an implied agreement that the cost of this machinery was to be amortized out of profit to be made on orders for cans to be given. It was also agreed that claimant was to purchase raw material to be manufactured into hard bread cans. Just what quantity of material claimant would be justified in purchasing under the circumstances above recited is a difficult matter to determine. All of the manufacturers were undoubtedly given to understand that the demand for hard bread cans was practically unlimited. Lieut. Graham virtually

ordered claimant and the other manufacturers to purchase improved machinery and to get into production as quickly as possible, and assured them that the formal orders for cans would be forthcoming. Under these circumstances, how many cans could claimant reasonably expect to receive orders for—5,000,000, 10,000,000? Would claimant be justified in placing orders in July, August, or September, 1918, for delivery of a large quantity of tin plate in June, 1919? In January, 1920? There was, of course, some limit. Claimant's schedule of deliveries shows that its daily output was about 24,000 cans during September, October, and up to November, 1918, at which time it got into full production and was able to turn out approximately 50,000 cans per day by operating two shifts. The purchase order given November 1, 1918, for 1,250,000 cans could probably have been filled by the end of December, 1918. Claimant would then have been ready for another order, for which it had the material in question, sufficient for 2,200,000 cans, already purchased. Undoubtedly claimant's officers acted according to their best judgment in ordering the material in question. They fully expected to receive an order which would require this material.

Whether or not claimant actually received orders for cans in sufficient quantities to satisfy its reasonable expectations is a difficult question to decide. But in view of the fact that claimant has used the excess material in its commercial business and has been able to dispose of all of it, and is unable to show that it suffered a loss, it is the opinion of the Appeal Section that claimant is not entitled to any relief.

2. The purpose and intent of the act of March 2, 1919, was to authorize the Secretary of War to adjust informal contracts on a basis that would result in no loss to a contractor who had made expenditures or incurred obligations upon the faith of a contract with the United States. No prospective or possible profits were to be allowed. The act does not say as of what date settlement shall be made. In the settlement for the material applicable to the contracts which claimant actually received, claimant was allowed 33½ per cent loss on the tin plate and 25 per cent loss on the solder. This settlement was made on the basis of prices prevailing as of February 1, 1919. When a contractor holds the material which had been purchased to apply on a Government contract, and is able to use it and dispose of it in its commercial business and suffers no loss thereon, the contractor can not insist on a settlement on the theory that he could have purchased the same material during the time it was used at a much lower price than was actually paid. The true test is, Did the contractor sustain a loss on the entire transaction? If he did, he should be reimbursed to the extent of that loss. He can not be

reimbursed the prospective or possible profits he might have made if he had bought the material at a lower price.

In the present case the Appeal Section finds that claimant was able to use the excess material in its commercial business and suffered no loss thereon. Consequently it is not entitled to any reimbursement.

DISPOSITION.

A final order denying relief will issue.

Lieut. Col. McKeeby and Capt. Woodfin concurring for the Appeal Section; Mr. Van Fossan concurring for the War Department Claims Board.

FEBRUARY 18, 1921.

Case No. 3007.

In re **CLAIM OF HARRY F. HANN.**

1. **SUBSTITUTION OF WORK UNDER A CONTRACT.**—Where a claimant has a formally executed contract to construct certain roads which are shown on the general authorization for road construction at a United States Army cantonment, and while so engaged upon the construction work is directed by the camp constructing quartermaster to build an emergency road, or one not contemplated under the original contract, and where the contractor complies with the instructions of the camp quartermaster and completes the emergency roadway, and later, because the funds appropriated to the work under the contract having become exhausted, two of the authorized road projects are abandoned, the emergency roadway will be considered as having been substituted in lieu of the abandoned authorized road projects, and the contractor is not entitled to receive a fee under these conditions greater than that stipulated in his formal contract.
2. **CLAIM AND DECISION.**—This is a claim filed under G. O. 103 for \$1,621.73, growing out of the construction of an emergency roadway. Held, claimant not entitled to relief.

Maj. Blackburn writing the opinion of the Board.

FINDINGS OF FACT.

1. This claim for \$1,621.73 comes to the Appeal Section, War Department Claims Board, on appeal under the provisions of G. O. 103, War Department, 1918, and is presented by Harry F. Hann, prime contractor, for and on behalf of Simmons, Hartenstein & Whitton (Inc.), of Charlotte, N. C., subcontractor. The claim was in the first instance presented to the supervising constructing quartermaster at Camp Jackson, Columbia, S. C., in the month of May, 1919, by the firm of Simmons, Hartenstein & Whitton (Inc.) and was disallowed. On May 27, 1920, it was presented to the War Department Board of Contract Adjustment on petition Form B in the name of the above-styled firm, as a claim arising under the act of March 2, 1919.

2. On June 24, 1920, a hearing was had before the Board of Contract Adjustment on the matters involved in the instant case. It appears that the firm was not correctly advised as to the proper method of procedure in the presentation of its claim, and for that reason forwarded the claim to the Board of Contract Adjustment in its own name when, as a matter of fact, and in strict accordance with the procedure governing the presentation of claims of this

character, it should have been presented through Harry F. Hann, the prime contractor for the construction work at Camp Jackson, Columbia, S. C. By its decision of August 16, 1920, the Board of Contract Adjustment held that, inasmuch as the claim then presented arose by virtue of the relationship existing between Simmons, Hartenstein & Whitton (Inc.) and Harry F. Hann, as subcontractor to the prime contractor, and there being no privity of contract between Simmons, Hartenstein & Whitton (Inc.) and the United States, and for the further reason that the claim had not been presented in the manner provided for in section 4 of the act approved March 2, 1919, the Board was therefore without jurisdiction and relief prayed for was denied.

3. The claim was thereafter, on September 21, 1920, presented to the War Department Claims Board, Appeal Section, under G. O. 103, W. D., 1918, in the name of Harry F. Hann, prime contractor for and on behalf of Simmons, Hartenstein & Whitton (Inc.), subcontractor, and is one which arises under the following circumstances:

4. On or about the 20th day of February, 1918, the United States entered into a formally executed contract with Harry F. Hann for the construction of certain additions to the general hospital at Camp Jackson, Columbia, S. C. Thereafter on September 17, 1918, the said Harry F. Hann contracted with the firm of Simmons, Hartenstein & Whitton (Inc.), which contract was reduced to writing and was approved by Walter M. Crunden, captain, Q. M. C., constructing quartermaster at Camp Jackson, on the 23d day of October, 1918. This contract contained the following provision:

"I. The subcontractor shall in the shortest possible time furnish the labor, materials, tools, machinery, equipment, facilities, and supplies, and do all things necessary for the construction and completion of the following work: At Camp Jackson, Columbia, S. C., *roadways (italics are ours)* at 6th National Army Cantonment."

and

"VI. The subcontractor shall be reimbursed by the contractor in the manner and for the items set out in Article II of the principal contract hereinabove incorporated (except that no part of this contract may be sublet), for such of its actual expenditures in the performance of the work designated in Article I hereof as may be approved or ratified by the contracting officer; and in addition thereto, as full compensation for the services of the subcontractor, including profit and all general or overhead expenses, the contractor shall pay to the subcontractor such sum as the contracting officer may approve and allow the contractor, according to the schedule of fees contained in the principal contract for a fee upon the work hereby included: *Provided, however,* That the amount of fee to be paid by the contractor to the subcontractor shall be fixed according to the schedule contained in Article III of the principal contract.

hereto attached, and shall not exceed the fee which under said schedule would be allowed a contractor for the work included if said work had been done under a direct and separate contract. The provisions of the principal contract shall govern the manner and time of determining the amount to be paid to the subcontractor if and when the same shall have been determined, allowed, and actually paid by the contracting officer to the contractor, *but the total fee to the subcontractor hereunder shall not exceed \$8,500.00.*" (*Italics are ours.*)

The roadways at Camp Jackson were to be constructed under the following official authorization:

[Official authorization.]

ENGINEERING BRANCH, CONSTRUCTION DIVISION,
Washington, D. C., August 23, 1918.

To Members of all Branches:

Project symbol No. 2008-23, "Camp Jackson."

1. In accordance with the approval of the Assistant Secretary of War, under date of August 16, 1918 (copy of which is hereto attached), you are hereby authorized to construct the roads at Camp Jackson, S. C., as outlined in the following projects:

(a) Project 1: Road to the truck scale; 300 feet in length; type, 16-foot concrete.

(b) Project 2: Road to the gasoline filling station; 400 feet in length; type, 16-foot concrete.

(c) Project 3: Road connecting old and new warehouses and refrigerating plant; 1,700 feet in length; type, 16-foot concrete.

(d) Project 4: Additional width of 12 feet to old warehouse roads, 2,800 feet in length.

(e) Projects 5 and 6: Crossroads connecting main roads of the camp; 7,290 feet in length; type, 16-foot concrete.

(f) Project 7: Roads to and around the base hospital. A sum has been appropriated for a part of this work. The original distance was given as 1.1 miles and the correct distance is 1.9 miles; therefore, the eight-tenths mile of this road is to be constructed. This road is to be a 16-foot concrete road.

(g) Project 8: Road around the new warehouses and grain elevator, 3,400 feet in length, 1,800 feet of which is to be of 30-foot concrete and the remainder to be of 16-foot concrete.

(h) Project 9: Road to and around the laundry to be constructed of 16-foot concrete.

(i) Project 10: Roads around remount headquarters, approximately 1,800 feet in length and type 16-foot sand clay.

(j) Project 11: Roads around the inner and outer circle connecting with the existing boulevard approximately 2,700 feet in length and type 16-foot sand clay.

2. The estimated cost is:

(7) R. W. W. & D. f. y. 1919-----	\$110,000
(9) C. & R. of H. f. y. 1919-----	18,000
Total -----	128,000

3. This road construction is to be done by the Construction Division in the regular manner from funds "R. W. W. & D.," 1919, and "C. & R. of H.," 1919, now available.

H. S. FRENCH,
Major, Quartermaster Corps.

HSF: TWN: JHN

Certified a true copy.

J. H. OSTERMAN,
Captain, Quartermaster Corps.

The subcontractor under the terms and provisions of his contract with the prime contractor was to receive as a fee 6½ per cent of the total amount expended in the construction of these roadways.

5. While the general construction work was in progress an emergency arose whereby it was found necessary by the constructing quartermaster to build a temporary roadway through certain portions of the camp site in order that the materials could be hauled to the proposed site of the camp hospital. A conference was held concerning this emergency roadway between Capt. Joseph E. Brown, assistant camp constructing quartermaster, Harry F. Hann, prime contractor, and the representative of Simmons, Hartenstein & Whitton (Inc.), subcontractor. As a result of this conference and under the direction of Capt. Brown the subcontractor suspended the authorized road work and directed its attention to building the emergency road. After this road had been completed the subcontractor again directed its attention to the authorized roadway projects.

6. Before all of the roads, as shown under the official authorization, were completed the appropriation therefor was exhausted, consequently certain of the proposed roadways were abandoned and the subcontractor performed no additional work under its contract. All construction work on Camp Jackson was suspended on April 22, 1919. The claimant here has been paid for the account of the subcontractors, as follows:

Final settlement accounts—Statement F-2.

Additions to hospital, etc., Camp Jackson, S. C., May 19, 1919.

Harry F. Hann, contractor.

Date of contract, February 20, 1918.

Third edition, emergency.

Suppl. contract dated September 24, 1918.

PAYMENTS TO GENERAL CONTRACTOR FOR ACCOUNT OF SUBCONTRACTORS.

Simmons, Hartenstein & Whitton (Inc.), subcontractors.

Date of subcontract, September 17, 1918. Roadways (included in item 3, sheet E).

Maximum fee, \$8,500.

Total payments to general contractor for account of subcontractor, except fee	\$144,601.02
Less nonfee items	120.98
	<hr/> 144,480.04
Material purchased by United States Government and used on this project by subcontractor on which subcontractor is entitled to fee (statement G, item 2)	1,653.50
Commissary deductions made from subcontractor's pay rolls on which subcontractor is entitled to fee	9,585.32
	<hr/> 155,718.86
Total subject to fee	8,500.00
Commission at schedule (maximum earned)	<hr/> 164,218.86
Less direct Government purchases	\$1,653.50
Less commissary deductions	9,585.32
Less fees earned but unpaid	4,936.08
	<hr/> 16,174.90
	<hr/> 148,043.96

7. On October 29, 1920, the War Department Claims Board, Appeal Section, by its decision held that—

“Inasmuch as the construction of the roadway at Camp Jackson was performed under authorization and direction of the camp constructing quartermaster, Camp Jackson, S. C., and that the same has been accepted by the United States, there is a valid and subsisting obligation resting upon the United States to pay Harry F. Hann, the prime contractor, that amount which is due to the firm of Simmons, Hartenstein & Whitton (Inc.), subcontractor, as a fee for the construction of the emergency roadway.”

8. The claim has been returned to the Appeal Section pursuant to a memorandum of the Claims Board, Construction Service, requesting “that the Appeal Section, War Department Claims Board, reconsider its decision.” Attached to this memorandum is a certified copy of the official authorization of the engineering branch, Construction Division, also a statement which it designated “Final settlement account, Statement F-2” had with Harry F. Hann, contractor, for additions to the hospital at Camp Jackson, Columbia, S. C., which have hereinbefore in these findings of fact been set out. A further hearing responsive to the request of the Construction Claims Board was held on February 1, 1921, at which hearing claimant was pres-

ent and gave additional testimony. The Appeal Section, War Department Claims Board, in its present consideration of the matters in issue has thoroughly reviewed all of the testimony heretofore taken and has considered all the papers and evidence of a documentary nature filed in this behalf, and it is upon this that the following decision is based.

DECISION.

1. From an inspection of Paragraph VI of the subcontract set out in the findings of fact it will be observed that the total amount to be paid the subcontractor as a fee for any and all work to be performed under the terms of the contract was not to exceed \$8,500. From the final settlement accounts, Statement F-2, it appears that the prime contractor has been paid for the account of the subcontractor the maximum amount provided for in Paragraph VI of the subcontract.

2. It is the contention of the claimant that it is entitled to the amount here claimed for, as an additional fee, beyond the maximum amount stipulated in the paragraph above referred to, because the roadway in question was an emergency proposition and not contemplated by either the prime or subcontractor at the time of the execution of the original contract with the United States. This position might be tenable if a different state of facts existed from those here presented. It is conceivable that if roadways additional to those designated in the authorization were constructed, and the subcontractor was called upon to construct them, then, under those circumstances, there might be created a situation such as would entitle the contractor to an extra fee. But from the facts and circumstances, which we have gleaned from the rather voluminous mass of testimony, it appears to us that when the subcontractor executed the contract it obligated itself to build roads, the cost of which would be so many thousands of dollars. It would make no difference to the subcontractor, if it were called upon to construct 1 road or 100 roads, if the amount expended in and about such road construction did not exceed the maximum amount which he would be called upon to expend. In other words, admitting for the purpose of argument that this roadway, which is the basis for the present claim, was not one which was contemplated at the time of the execution of the original contract, and was, in fact, an emergency road, would it make any difference to the subcontractor where or under what conditions it expended its money so long as the amount it was forced to spend was within the limitations as provided for in the contract? We can not see how the subcontractor could possibly be affected by such a situation. In this case the subcontractor has not been called upon to make an expenditure greater than that which was origi-

nally provided for in the contract. The cost of the emergency roadway was approximately \$26,000, this expenditure decreased the original amount of the road appropriation at Camp Jackson to such an extent that some two or three of the authorized road projects were abandoned, because of the lack of funds. It, therefore, may be said that the emergency roadway was, in effect, substituted for and in the place of the authorized roadways so abandoned.

3. We are convinced that the subcontractor has done nothing more than that which it might have been reasonably called upon to do, it has expended no greater amount of money and has performed no service to the Government beyond that contemplated in its contract, and for all things done and all services rendered the subcontractor has been paid the maximum amount allowable under its contract. For the foregoing reasons we are of the opinion, and so hold, that the subcontractor is not entitled to the fee here claimed for.

4. The former decision of this Board, approved October 29, 1920, is hereby vacated, set aside, and held for naught, and the relief prayed for in claimant's petition is hereby denied.

DISPOSITION.

The War Department Claims Board, Appeal Section, will enter a final order denying relief.

Lieut. Col. McKeeby and Capt. Marcum concurring for the Appeal Section; Mr. Van Fossan concurring for the War Department Claims Board.

FEBRUARY 19, 1921.

Case No. 3029.

In re **CLAIM OF WIDEN-LORD TANNING CO.**

1. **INFORMAL AGREEMENT.**—Where a contractor is advised by an agent of the Secretary of War that the Government will accept all bark-tanned leather manufactured by the contractor, special facilities being contemplated by both parties, and the contractor thereupon equips a plant and manufactures bark-tanned leather, the Government is obligated under the act of March 2, 1919, to compensate the contractor for its losses in manufacturing the leather.
2. **CLAIM AND DECISION.**—Claim for \$15,681.68, under the act of March 2, 1919, for manufacturing bark-tanned leather. Held, claimant is entitled to recovery.

Capt. Miller writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim was decided by the War Department Board of Contract Adjustment in an opinion adverse to claimant on May 8, 1920, reported in Volume V, part 1, page 265, as case No. 150-C-1528, whereupon claimant appealed the entire matter to the Secretary of War.

2. On November 1, 1920, the Secretary of War remanded the claim to the Appeal Section, War Department Claims Board, with the following order for further proceedings:

“Upon consideration of the record in this matter, and in accordance with the accompanying recommendation, it is directed that the papers be returned to the War Department Claims Board for recommendation by the standing committee with regard to granting a rehearing.

“**NEWTON D. BAKER,**
“*Secretary of War.*”

3. At a meeting of the standing committee, War Department Claims Board, held November 9, 1920, a motion was made and carried that the case be returned to the Appeal Section with direction to reopen same, giving to claimant permission to amend its claim so that it could be heard by the Appeal Section “as to loss or damage on the making of bark tanned leather.”

4. The original claim covered losses incurred in manufacturing chrome upper leather. The claim, as now amended, consists of \$7,481.68, as compensation for losses incurred in the preparation of special facilities to manufacture bark tanned leather, and \$8,200 as losses sustained in the actual manufacture of bark tanned leather, a total of \$15,681.68.

5. On or about April 28, 1918, Capt. James J. O'Neil, of the hide and leather control branch, Quartermaster General's Department, visited Mr. Peter Widen, president of claimant company, and urged him to make bark tanned leather for the Government, stating to Mr. Widen, according to Capt. O'Neil's testimony, "that if he made these bends, fitted to Government specifications, that the Government would guarantee to take every one of them." Mr. Widen has testified that Capt. O'Neil, upon being informed that claimant would require a new plant in order to produce this leather, instructed Mr. Widen to proceed with the new venture involving the equipping of a new plant at Peabody, Mass., while Capt. O'Neil stated that he expected all manufacturers to incur expenses in preparing to manufacture the bark bends, including the purchase of certain facilities, but did not recall the specific conversation with Mr. Widen concerning special facilities.

6. The evidence shows that although claimant was not a manufacturer of bark bends in its regular course of business, it, relying upon this oral agreement and the assurances of Capt. O'Neil, immediately set to work and procured a plant at Peabody, Mass., adapted to the purpose desired, purchased machinery and material, and set the plant up as a tannery suitable for the manufacture of bark bends.

7. The claimant received notice from the Government to cease making this kind and quality of leather on June 20, 1918, and upon complying with the same, had left on hand, manufactured or in process, 1,200 bends for which there was no commercial market. These bark bends were thereupon, at the request of the Government, reprocessed, turned into chrome retanned chocolate grain finished upper leather and sold to the civilian trade at a loss of 40 per cent of the cost of manufacture. Claimant estimates that it saved the Government 80 per cent of the loss through reprocessing the 1,200 bends.

DECISION.

1. In accordance with the action of the standing committee of the War Department Claims Board as above set forth, the decision of the War Department Board of Contract Adjustment, dated May 8, 1920, denying relief, is hereby vacated and set aside.

2. The evidence shows that an oral agreement was entered into between Capt. James J. O'Neil, Quartermaster Corps, and claimant on April 28, 1918, wherein the Government agreed to take from claimant all the bark tanned bends manufactured by claimant, and obligated itself to pay to claimant all expenses incurred in manufacturing such bark tanned bends, including the purchase of special facilities required in such work. This agreement comes within the purview of the act of March 2, 1918.

3. However, the item of rent can be allowed only so far as to include the period from April 28, 1918, to August 30, 1918, inclusive, at the rate of \$75 per month, in view of the fact that the plant was used for other purposes after the latter date.

4. The item for services of Peter J. Widen for \$1,000 for time expended by him in setting up plant between April 11, 1918, and June 20, 1918, is disallowed. The testimony of Mr. Widen was that this represented no additional compensation paid him by his company, but that he received the same salary before and during the fitting up of the Peabody plant, and that the time spent by him there was in addition to his regular duties at the Danvers plant. The item of services of C. Carlson, master mechanic, for work in setting up plant from April 11, 1918, to June 20, 1918, stands in the direct converse of the item of Mr. Widen's services, in that it was actual money paid out for this particular job and was an additional expense to the claimant. This item is allowed from the period from April 28, 1918, to June 20, 1918.

5. The claimant is entitled to recover the loss incurred in the actual manufacture of the 1,200 bark bends, this loss being determined through deducting the value of the chrome retanned leather from the cost of manufacturing the 1,200 bark bends plus the cost of transforming these bends into chrome retanned leather.

6. The other items of expense are allowed, in so far as they represent expenditures made and obligations incurred between April 28, 1918, and June 20, 1918, in equipping the plant at Peabody, Mass.

DISPOSITION.

This Board will make and transmit to the Purchase Section, War Department Claims Board, a statement of the nature, terms, and conditions of the agreement and certificate Form "C," for action in the manner provided in subdivision "C," section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division, General Staff.

Lieut. Col. McKeeby and Capt. Frazer concurring for the Appeal Section; Mr. Van Fossan concurring for the War Department Claims Board.

FEBRUARY 21, 1921.

Case No. 3057.

***In re* CLAIM OF FLETCHER SAVINGS & TRUST, RECEIVERS OF "THE STENOGRAPHIC COMPANY," INDIANAPOLIS, IND.**

- 1. ORAL AGREEMENT.**—Where an officer enters into a verbal agreement prior to November 11, 1918, with claimant, and claimant upon the faith of such agreement furnishes labor and material, it is entitled to payment therefor.

Maj. Hill writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. Under date of April 20, 1918, a proxy signed fixed price contract, War Ord. 3701-1260 TW. was entered into between claimant and the Ordnance Department for loading, assembling, and packing 4,200,000 V. B. rifle grenades, Mark I, and a like quantity of fuses for the same. This contract was suspended before completion. An award has been made to claimant thereon upon which payment is being made to claimant's receiver.

2. Under date of April 30, 1919, claimant's receiver presented to the Trench Warfare Division a bill for \$8,168.72 for services rendered on account of experimental work conducted by claimant at the request of, and under the direction of, Lieut. Samuel J. White, et al. This item was disallowed by the Ordnance Section because the contractor could not be reimbursed for it under the contract and because it was founded upon a verbal agreement.

3. Lieut. Samuel J. White has furnished an affidavit at the request of this section which reads in part as follows:

"In April, 1918, I was directed to proceed from Washington, D. C., to Indianapolis, Ind., on official business pertaining to the operations of the Ordnance Department. The Stenographic Company was notified in advance from Washington, D. C., that I would arrive at the plant on a certain date to carry on experimental work. On my arrival at the plant the Stenographic Company furnished me with all the equipment and help necessary to perform the following work:

"I. The testing of V. B. rifle grenade, Mark I fuse container, using McAdam primer to determine the cause of premature. This test was made with and without booster charge of black powder, using one and two vent fuse containers.

"II. Testing pressed powder pellet primers without anvil for ignition of the fuse train. This test was made with and without booster charge of black powder, using one and two vent fuse containers.

"III. Testing fuse containers with crimped ends with and without conical depression in end of fuse train to determine the best method for firing of the detonators.

"IV. Loading grenades with Trojan grenade powder and testing for proper density to give best fragmentation.

"Several trips were made to and from Fort Harrison for munitions to carry on the above tests.

"In addition to conducting the above tests the Stenotype Company furnished 1,000 crimped end fuse containers with fuse train, but without primers, for further experimental work in Washington, D. C.

"The Stenotype Company was informed that all expenses for this experimental work, which was not covered by contract, would be paid by the Government."

4. In an affidavit furnished to this section Capt. Alex G. Hawes has substantiated the experimental work done and stated that the work was approved by him as Army inspector of ordnance under instructions from Ordnance Department.

DECISION.

1. It is the opinion of this section that on or about April 23, 1918, the Ordnance Department entered into an agreement with the Stenotype Co., of Indianapolis, Ind., by the terms of which the Stenotype Co. agreed to furnish labor and materials in the conduct of experimental work on V. B. rifle grenades, Mark I fuse containers.

DISPOSITION.

1. This section will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Ordnance Section for appropriate action.

Lieut. Col. McKeeby and Lieut. Tabb concurring for the Appeal Section; Mr. Van Fossan concurring for the War Department Claims Board.

FEBRUARY 21, 1921.

Cases Nos. 3048, 3049, 3050, 3051, and 3052.

In re **CLAIMS OF U. S. CARTRIDGE CO.**

- 1. LABOR-DISPUTES CLAUSE.**—Where claimant's representative is verbally told by officers of the Legal Section and of the Procurement Division of the Ordnance Department that written contracts with his company would contain a labor-disputes clause similar to that contained in "Instructions to Bidders" and the labor-disputes clause is omitted from the written contracts by mutual mistake and its omission is not discovered by the contractor until after execution of the contracts, the written contracts do not express the intention of the parties. The written contracts which were proxy signed will be reformed so as to incorporate therein the labor-disputes clause. As to the formal contracts which did not contain the labor-disputes clause, the Secretary of War has no jurisdiction to grant relief. However, claimant is not precluded from petitioning the Auditor for the War Department and the Comptroller of the Treasury for a reformation of the formal contracts.
- 2. ATTEMPT TO RESTORE A LOST CONTRACT.**—Where six copies of a written contract were executed by claimant and returned to the Ordnance Department and the same were lost and never found and duplicate copies of the original contract are executed by both parties after the armistice, the execution of the copies of the original contract is void for want of consideration, as it was an attempt to create an obligation against the United States where none existed.
- 3. FINAL AWARD.**—Where claimant executes a final award Form 1, which purports to be in final settlement of a certain contract, without knowing the full purport of the award and without intending thereby to release another claim then pending on the same contract, and said award is approved by the Ordnance Claims Board and the War Department Claims Board and signed by representatives of said boards without knowing that claimant had another claim pending on the same contract, there was a mutual mistake in making and executing said award. Also if the final award is not just and fair there has not been that payment, adjustment, and discharge of the agreement upon a fair and equitable basis which the act of March 2, 1919, requires the Secretary of War to make. An award made under such circumstances should be vacated and another award made upon a fair and equitable basis.

Capt. Taylor writing the decision of the Board.

FINDINGS OF FACT.

1. These claims are for reimbursement for increased wages paid by claimant to its employees on five contracts which did not contain a labor-disputes clause. The increased wages were paid pursuant to an award made by Dr. E. M. Hopkins, acting for the Secretary of

War, dated July 30, 1918, which was retroactive to May 7, 1918, the result of which, claimant contends, was an increase in the cost of the articles covered by the contracts in question as well as other contracts which claimant had with the United States, and which did contain the labor-disputes clause.

2. The amounts involved in these claims are as follows:

Claim No. 3048	\$36,000.00
Claim No. 3049	3,439.77
Claim No. 3050	131,775.95
Claim No. 3051	42,467.20
Claim No. 3052	10,569.60

3. These claims were originally presented to the Boston district ordnance claims board prior to June 30, 1919. They were referred by that board to the Ordnance Claims Board for consideration. Claimant then presented them to the Ordnance Claims Board in the form of a petition for reformation of the contracts. The Ordnance Claims Board advised claimant to present the claims to the Appeal Section as class B claims under the act of March 2, 1919, and the claims are now before the Appeal Section in that form. However, claimant is asking for relief in the alternative, i. e., (1) that the contracts be re-formed or (2) that an agreement be found to exist within the purview of the act of March 2, 1919.

4. The following are the contracts in question, with material data relative to each one:

Contract No.	Date of order.	Date in formal contract.	Material.	Negotiator.	Kind of contract.
G-1425-788A....	Dec. 17, 1917	Jan. 31, 1918	20,000,000 49-gr. primers.	Maj. J. G. Cowling.	Lost and re-stored.
P-3472-1637A...	Feb. 2, 1918	Mar. 1, 1918	2,240,000 49-gr. primers.	Lieut. Esmond P. O'Brien.	Proxy-signed.
R-292-B.....	Dec. 25, 1917	Apr. 1, 1918	30,000,000 .45 cartridges.	Capt. A. N. Holcombe.	Do.
P-11350-2872A..	June 10, 1918	July 5, 1918	9,000,000 49-gr. primers.	Lieut. E. G. Grant	Formal.
P-12289-3034A...	.....	July 20, 1918	8,760,000 49-gr. primers.	Capt. L. S. Gordon.	Do.

These contracts are all in writing. Contract G-1425-788A was lost. Apparently it was never executed on behalf of the Government. However, it was set up or restored by a formally executed contract subsequent to the armistice, as will be hereafter more fully set forth. Contracts P-3472-1637A (Claim No. 3052) and R-292-B (Claim No. 3050) were proxy-signed contracts. Contracts P-11350-2872A (Claim No. 3051) and P-12289-3034A (Claim No. 3049) were formal contracts.

Contract P-12289-3034A is a suspended contract. The other four contracts have been fully performed by claimant. Contract R-292-B has been validated.

5. None of the five contracts in question contains a labor-disputes clause. It is claimant's contention that this clause was to have been incorporated in each of the above-mentioned contracts, and that its omission therefrom was a mutual mistake, i. e., failure by the contracting officer to incorporate the labor-disputes clause in the contracts was a mistake on the part of the Government, and claimant's representative signed the contracts thinking the clause had been incorporated therein.

6. The pamphlet entitled "Instructions to Bidders," dated September 25, 1917, stated as follows:

"All contracts will contain the following clauses:

* * * * *

"17. *Labor disputes*.—In the event that labor disputes shall arise directly affecting the performance of this contract and causing or likely to cause any delay in making the deliveries upon the date or dates specified, the contractor shall address a written statement thereof to the Chief of Ordnance for transmission to the Secretary of War, with the request that such dispute be settled, providing such information and access to information within the control of the contractor as the Secretary of War shall require, and it is stipulated and agreed that the Secretary of War may thereupon settle or cause to be settled such dispute, and the contractor agrees to accede to and comply with all the terms of such settlement. If the contractor is thereby required to pay labor costs higher than those then prevailing in the performance of this contract prior to such settlement, a fair addition to the contract price of the material shall be made therefor; but if such settlement reduces the labor costs to the contractor, a fair deduction shall be made from the contract price, all as may be determined by the contracting officer. No claim for addition or deduction shall be made unless the same has been ordered in writing."

Prior to the date of the negotiation of the first contract in question claimant had several other fixed-price contracts, all of which contained the labor disputes clause substantially in the form above quoted. Those contracts were:

No. 14228, dated August 1, 1917, for 28,000,000 .45 cartridges.

No. 14448, dated August 23, 1917, for 25,000,000 .45 cartridges.

No. GA-126, dated August 22, 1917, for 5,000,000 110-gr. primers.

7. Mr. T. B. Doe, general manager of claimant company, conducted all of the negotiations with the Ordnance Department for contracts with his company. When these earlier contracts were negotiated Mr. Doe was informed by Col. Hayden Eames, Capt. A. M. Holcombe, and other officers of the Ordnance Department, that all fixed-price contracts would contain the labor-disputes clause. This testimony of Mr. Doe is corroborated by the testimony of Maj. J. G. Cowling, Maj. A. M. Holcombe, Lieut. Esmond P. O'Brien, Lieut.

E. G. Grant, and other officers of the legal section of the Ordnance Department, all of whom were in the Ordnance Department during the summer and fall of 1917. The above-mentioned officers testified at the hearing on these claims, February 3, 1921, that all of the provisions of Instructions to Bidders were to be incorporated in all fixed-price contracts, and that the labor-disputes clause was never intentionally omitted from any contract except upon the special request of the contractor. Some open-shop contractors did request that this clause be omitted from their contracts, and this request was complied with. Claimant's factory is what is termed a closed shop. Claimant never at any time requested that this clause be omitted from its contracts, but, on the other hand, was apparently anxious that it be incorporated in all of its contracts.

8. The first of the contracts in question to be negotiated which did not contain the labor-disputes clause was G-1425-788A. Maj. J. G. Cowling, of the purchase section, Gun Division, was the negotiating officer in this contract. He testified that according to his recollection no specific reference was made by either him or Mr. Doe relative to the labor-disputes clause being made a part of the contract. All of the provisions of Instructions to Bidders was to go into the contract. The procurement order, War Ord. G-1425-788A, which preceded the written contract, is dated December 17, 1917. In the upper left-hand corner of this document is the following:

"The contract covering this order will be prepared immediately upon receipt of the contractor's acceptance endorsed on the copy forwarded herewith, and will include the pertinent provisions contained in 'Instructions to Bidders' dated Sept. 25, 1917."

This procurement order, signed by Jay E. Hoffer, colonel, Ordnance Department, U. S. Army, was forwarded to claimant, together with a copy of Instructions to Bidders, under date of December 31, 1917. Claimant signed one copy of the procurement order and returned it on January 28, 1918.

Several copies of a formal written contract based on the above procurement order were printed. The name of Col. Hoffer appeared in the body of the contract as the contracting officer, and it was prepared for his signature. Six copies of this contract were sent to claimant on February 23, 1918, with instructions to execute and return all copies. (Apparently Col. Hoffer had not signed the contracts.) On March 12, 1918, claimant returned all copies unsigned, stating that an error had been made in the contract relative to certain matters which are not now pertinent to the question involved, and requesting that corrections be made. These copies of the proposed contract did not contain the labor disputes clause, but no mention of this omission was made by claimant in its letter of March 12. The

corrections desired by claimant were made by interlineations, and the six copies were returned for claimant's signature on March 18, 1918. Mr. C. E. Hoxie, agent for claimant, executed the six copies of the contract and returned them to the legal section, Procurement Division, on March 27, 1918. These six copies of the contract were lost. They have never been located. It has been impossible to determine whether or not they were ever actually signed on behalf of the United States by Col. Hoffer or any other contracting officer. The Ordnance Department was unable to furnish claimant with an executed copy of the contract. Disbursements were made on the strength of the procurement order for some time, but finally the disbursing officer began to doubt his authority to make payments without a written contract. Finally, some time after the armistice, some unexecuted copies of the contract as originally printed were secured. The proper interlineations embodying the corrections requested by claimant in its letter of March 12, 1918, were made, and these copies were then executed as of January 31, 1918. In the body of the contract the name of Col. Hoffer as the contracting officer was crossed out and the name of R. H. Hawkins, major, Ordnance Department, was interlined. Maj. Hawkins also signed the contract as contracting officer. The labor disputes clause is omitted from this document. The purpose of the execution of this document was to set up or restore the original lost copies of the contract in order to satisfy the disbursing officer.

9. The omission of the labor-disputes clause from this contract was not discovered by claimant or officers of the Ordnance Department until the extra copies of the printed contract were executed in the manner above recited. At that time no effort was made by claimant to have the clause inserted, as the only purpose then was to set up or restore the lost contract in its original form.

10. The next contract in question to be negotiated which did not contain the labor-disputes clause was contract R-292-B (Claim No. 3050), which was for 30,000,000 .45 ball cartridges. This procurement order emanated from the Small Arms Division. It is dated December 28, 1917, and makes no reference to the pamphlet "Instructions to Bidders." However, paragraph 4 of the order is as follows:

"4. Formal contract with you covering the terms of delivery and payment, and containing such and other usual terms as the Ordnance Department may prescribe, will be prepared and submitted to you for signature."

Claimant accepted this order by letter dated January 7, 1918.

This procurement order was prepared by Capt. A. M. Holcombe, at that time chief of the contract section, Small Arms Division. It does not appear that in the oral negotiations for this contract any specific reference to the labor-disputes clause was made by either

of the contracting parties. Maj. Holcombe testified that on September 25, 1917, Instructions to Bidders was issued, and that orders had been issued that all fixed-price contracts should contain the provisions set forth in Instructions to Bidders. In October, 1917, contract form No. 597 was adopted in the Ordnance Department as the standard form of contract. This form contained all of the provisions of Instructions to Bidders, including the labor-disputes clause (Tr. p. 73). Maj. Holcombe testified that it was his intention that the formal contract covering Procurement Order R-292-B should contain the labor-disputes clause as provided in the standard form of contract then in use, and that any mention of the clause was considered unnecessary by him. Mr. Doe testified that at the time this procurement order was negotiated the question of whether or not the labor-disputes clause would be incorporated in the formal contract was discussed by him with Col. Eames, and Col. Eames stated that this clause would be a part of the contract.

The formal contract which followed the procurement order was prepared after Maj. Holcombe was transferred to another section. It did not contain the labor-dispute clause. This contract is dated April 1, 1918. In it the name of Samuel McRoberts, colonel, Ordnance Department, United States Army, appears as the contracting officer. The contract is proxy-signed by Chas. N. Black, lieutenant colonel, Ordnance Department, N. A., as the contracting officer.

The omission of the labor-dispute clause from this contract was not discovered by claimant until in August, 1918, as will hereafter appear.

11. The next contract to be negotiated which did not contain the labor-dispute clause was No. P-3472-1637A (claim No. 3052), which was for 2,240,000 49-gr. percussion primers. No procurement order was ever issued on this contract. The negotiations were conducted in writing between Lieut. Esmond P. O'Brien, of the Production Division, Purchase Section, Projectiles Branch, and Mr. Doe. The offer and acceptance are dated February 16, 1918, and February 19, 1918, respectively. The offer signed by Lieut. O'Brien made no mention of instructions to bidders, nor did it recite that a formal contract would later be issued covering the order in question.

The written contract is dated March 1, 1918, and is proxy-signed by Lieut. Col. Black as the contracting officer. C. E. Hoxie signed on behalf of claimant. The omission of the labor-disputes clause was not discovered by claimant until in August, 1918, as will hereafter appear.

Lieut. O'Brien testified that his instructions from Maj. Cowling, his chief, were that all contracts should contain the provisions of instructions to bidders and he assumed that the labor-disputes clause would be incorporated in the contract which would be issued to cover the order in question. Claimant did not offer any evidence that in

the negotiations which preceded the issuance of the offer of February 16 any mention had been made by Mr. Doe relative to incorporating the labor-disputes clause in the contract.

12. The next contract to be negotiated which did not contain the labor-disputes clause is P-11350-2872A (claim No. 3051) for 9,000,000 49-gr. percussion primers. This is a formal contract. No procurement order was issued on this contract, and the order was placed by letter dated June 10, 1918, signed by E. G. Grant, first lieutenant, Ordnance R. C. No reference is made to Instructions to Bidders, nor was it stated that a formal contract would follow. However, the letter did make reference to contract G-1425-788A for 20,000,000 49-gr. percussion primers and to contract P-3472-1637A for 2,240,000 49-gr. percussion primers. This reference was apparently for the purpose of showing that the present order was an additional order for 49-gr. percussion primers similar to the contracts which claimant already had for the same article.

Lieut. Grant personally negotiated this contract with Mr. Doe. He testified that no reference to Instructions to Bidders was made by either party during the negotiations. He further testified that the orders then in force in the Ordnance Department were to the effect that all contracts should contain the provisions of Instructions to Bidders, and that all contracts negotiated by him were negotiated on the assumption that all the provisions of Instructions to Bidders would be incorporated in the written contract.

The formal contract is dated July 5, 1918, and is signed by R. P. Lamont, colonel, Ordnance, N. A., as the contracting officer. Mr. Hoxie signed on behalf of claimant.

The omission of the labor-disputes clause from this contract was not discovered by claimant until in August, 1918, as will hereafter appear.

13. The next contract to be negotiated which did not contain the labor-disputes clause was P-12289-3034A (claim No. 3049), which was for 8,760,000 49-gr. percussion primers. This is a formal contract. No procurement order precedes this contract. The order was placed by a letter dated July 20, 1918, signed by Capt. L. S. Gordon. Some confusion arose about this order and the order for 9,000,000 primers dated July 5 signed by Lieut. Grant. Both orders were confirmed by letter dated August 15, signed by Capt. Gordon. No mention was made of Instructions to Bidders in the letter placing this order, nor was any mention made that a formal contract covering the order would follow. Apparently there were no verbal negotiations preceding the placing of this order.

The formal contract was dated July 20, 1918, and was signed by Col. Lamont, whose name appears in the body of the contract as the contracting officer. The contract was signed on behalf of claimant by

C. E. Hoxie. The omission of the labor disputes clause from this contract was not discovered by claimant until in August, 1918, as will hereafter appear.

14. Claimant's explanation of its failure to discover the omission of the labor disputes clause at the time the several contracts were executed on its behalf by Mr. Hoxie is that during the spring and summer of 1918 all its office managers were busy on production and had little time to devote to the details of the contracts entered into with the Government. Also, Mr. Paul Butler, treasurer of claimant company, who was ordinarily charged with the duty of signing contracts, became quite ill in January, 1918, and was unable to attend to the duties of his office from that time until his death, September 6, 1918. Mr. Hoxie, who held the position of paymaster in claimant's company, had also been designated by the directors as one of its agents with authority to sign contracts. However, Mr. Hoxie had no discretion in the matter of the terms of the contracts presented to him for his signature, neither did he have authority to negotiate contracts. He simply affixed his signature to whatever was presented to him for that purpose. Hence, it is doubtful if Mr. Hoxie even read the contracts which were presented to him for his signature.

15. The discovery of the omission of the labor-disputes clause from the contracts involved in these claims came about in the following manner: Contract P-6489-1489A for 60,100,000 .45 caliber cartridges had been negotiated and the copies of the formal contract were forwarded to claimant for signature in July, 1918. One of claimant's officials discovered that the labor-disputes clause had been omitted from this contract, and on July 25, 1918, the unsigned copies of this contract were returned to the Ordnance Department with the request that the labor-disputes clause be incorporated therein, as it was claimant's understanding that this clause was to be in all of its contracts. A new contract containing the labor-disputes clause was accordingly prepared and sent to claimant for signature. This contract is not involved in this claim, but this incident is cited to show that the Ordnance Department intended, and claimant understood, that all contracts should contain the labor-disputes clause.

After the above incident claimant's officials examined the copies of all contracts it then had which had already been signed, and discovered that the labor-disputes clause had been omitted from four of the five involved in these claims. As claimant at that time had no copy of contract G-1425-788A, it having been lost as above recited, the omission of the clause from that contract was not discovered until the effort was made to set up or establish the contract after the armistice, as heretofore recited.

Immediately upon learning of the omission of the clause from the contracts which had already been executed, claimant made frantic

efforts to have the contracts amended by inserting the labor-disputes clause. This occurred in August, 1918. Several trips were made to Washington and conferences had with various officers in the legal section of the Ordnance Department. Claimant was advised that the matter was being considered and that it had been referred to the Judge Advocate General for an opinion as to whether or not the contracts could be modified by incorporating the labor-disputes clause therein. However, nothing ever came of these efforts to get the contracts reformed.

THE WAGE AWARD.

16. Early in June, 1918, labor troubles developed at claimant's Lowell plant, where work on the Government contracts was being carried on. The labor disputes were by claimant referred to the Chief of Ordnance in a written communication dated June 13, 1918, as required by article 17 of Instructions to Bidders.

The labor disputes were settled by an award made by Dr. Ernest M. Hopkins, acting for the Secretary of War, said award being dated July 30, 1918, but which was retroactive to May 7, 1918. This award prescribed substantial increases in wages paid to labor over the prices paid by claimant to its employees at the time the contracts in question were entered into. This award was carried out by claimant with such modifications as were subsequently made by the Secretary of War.

17. It should be noted that when the labor disputes were first referred to the Chief of Ordnance claimant did not make specific reference to any Government contracts, production on all of which was being interfered with by the labor troubles. (See Cl. Ex. No. 27.)

The award also made no reference to specific contracts to which it was applicable. Apparently claimant had not at this time discovered that the labor-disputes clause had been omitted from the five contracts involved in these claims. It is likewise apparent that the Ordnance Department and the Secretary of War, acting through Dr. Hopkins, assumed that this clause was in all of claimant's contracts, and that the award was therefore applicable to all contracts which claimant had with the Government.

18. The claims for increased wages paid by claimant to its employees on all of its contracts—i. e., both those which contained the labor-disputes clause and those which did not contain labor-disputes clause—by reason of the award of Dr. Hopkins have been audited and approved by the Government accountant in charge at claimant's Lowell plant. Whether the figures approved are for the full amount of increased wages so paid by claimant or were made on the basis

of "a fair addition to the contract price," as provided by the labor-disputes clause, and in conformity with the decision of the Secretary of War in re claim of American Tube & Stamping Co., Board of Contract Adjustment, No. 150-C-1979, does not appear, nor is this a matter which is before the Appeal Section at this time.

Claimant has already been reimbursed, or presumably will be reimbursed, the amounts approved by the accountant in charge on contracts 14066, 14448, GA-126, and P-6489-1489SA, these being formal contracts which contained the labor-disputes clause.

There was one other contract which did not contain the labor-disputes clause, but no claim for increased wages has been made by claimant on this contract. The reason for this is that most of the labor on this contract was performed after suspension thereof, and the cost of labor on this contract is included in the labor and overhead on the work in process, etc., and as such has been allowed under that claim.

19. As heretofore stated, the claim for increased wages on the five contracts involved in these claims resulting from the award by Dr. Hopkins was first presented by claimant to the Boston district ordnance claims board prior to June 30, 1919, and was by that board referred to the Ordnance Claims Board at Washington to be handled separate and apart from other claims on the same contracts. Claimant also presented to the Boston district board a claim on contract R-292-B for increased cost due to change in packing and in change of load form No. 1 to No. 3 powder.

The claim on these two items was presented under the act of March 2, 1919, as a class A claim. It set forth the date when the informal agreement was entered into, the articles contracted for, the price to be paid, etc., and paragraph 4 thereof was as follows:

"4. That hereto attached is an attested copy of copies of the best written evidence within claimant's control of the nature, terms, and conditions of the said agreement in the form of signed contract."

The attached "signed contract" referred to is the proxy-signed contract, R-292-B, dated April 1, 1918. This statement of claim was executed by claimant by Butler Ames, treasurer, June 17, 1919. A form C certificate was issued by the Ordnance Claims Board, dated June 30, 1919, and recites, in part, as follows:

"We, the Ordnance Claims Board, having made due and proper investigation, find that an agreement was entered into in good faith between the U. S. Cartridge Company, the claimant, and Chas. N. Black, Lt. Col., Ord. N. A., an officer or agent acting under the authority, direction, or instruction of the Secretary of War on or about the 1st day of April, 1918 * * * And that the documents attached hereto constitute a detailed statement showing the nature, terms, and conditions of said agreement: * * *"

This certificate was signed by claimant as follows:

"Accepted and approved without prejudice:

"U. S. CARTRIDGE COMPANY,
"By BUTLER AMES,
Treasurer, Claimant."

20. The claim on these two items was handled by the Boston district board, and an award dated May 10, 1920, was made by the Ordnance Claims Board and forwarded to the Boston district board on the same date, with instructions to submit the same to contractor for its signature. A statutory award in the sum of \$6,577.44 was prepared by the Boston district claims board and was submitted to and signed by claimant on May 21, 1920. This award is on statutory award form 1, and purports to be in full adjustment, payment, and discharge of contract R-292-B, paragraph 2 thereof reading as follows:

"2. The Secretary of War hereby awards to said claimant the sum of six thousand five hundred seventy-seven dollars forty-four cents (\$6,577.44), which sum in conjunction with the payments hereinbefore mentioned made or to be made for the articles, work, or facilities heretofore delivered and accepted shall be in full adjustment, payment, or discharge of said agreement."

This award was approved and signed by Maj. L. W. Searles, member of the Ordnance Claims Board, on June 3, 1920, and was approved by the War Department Claims Board and signed by E. H. Van Fossan, member of the board, on June 3, 1920.

21. Mr. W. R. B. Whittier, treasurer of claimant company, who signed this award on behalf of claimant, testified that he signed it without knowing that it purported to be in full adjustment, payment, and discharge of the contract in question, but understood that it was only for the items enumerated in the award, and he did not have any intimation that it in any way affected the claim for \$131,775.95 for increased wages paid employees on the same contract, which latter claim was at that time pending before Maj. R. H. Hawkins, Ordnance Department, a member of the Ordnance Claims Board.

22. Both Maj. Searles and Mr. Van Fossan testified that at the time they signed the award they did not know that claimant had another claim pending before the Ordnance Claims Board on this contract, to wit, the claim for increasing wages, amounting to \$131,775.95.

They both stated that they signed the award with the understanding that it was in final settlement of the contract in question.

It should be stated in behalf of claimant that apparently the first knowledge any officials of claimant had that this award purported to be in final settlement and discharge of contract R-292-B was the date of the hearing on these claims, February 3, 1921.

DECISION.

1. That it was the intention of the officers of the Ordnance Department, who negotiated the contracts in question, and also the intention of claimant's representative who negotiated them, that all of the written contracts, when prepared, should contain the labor-disputes clause, is clearly established. Mr. Doe was told by several officers in the legal section of the Ordnance Department, as well as by officers in the procurement section, that all contracts with his company would contain the labor-disputes clause. Instructions to Bidders stated that "all contracts will contain the following clauses":

The labor-disputes clause was one of the clauses in that pamphlet. Claimant was therefore fully justified in assuming that all future contracts entered into by it with the United States would contain the labor-disputes clause unless a specific agreement was entered into to the effect that that clause should be omitted from a particular contract.

Claimant's position with reference to these claims is very similar to the position of the Colt Manufacturing Co. in respect to its contracts with the Ordnance Department. (See Decisions of Board of Contract Adjustment, Claims Nos. 1574 and 1991.) In those cases the testimony was to the effect that on December 10, 1917, Maj. McFarland wrote the contractor stating that all contracts entered into with the Colt Manufacturing Co. would contain the labor-disputes clause.

Procurement Order 1425-788A (claim 3048) contained a specific promise that the written contract covering that order would include the pertinent provisions of Instructions to Bidders. Unquestionably the labor-disputes clause was one of the pertinent provisions of that pamphlet.

Procurement Order R-292-B (claim 3050), dated December 28, 1917, while making no reference to Instructions to Bidders, did recite that the formal contract, when prepared, would contain "such other and usual terms as the Ordnance Department may prescribe." The Ordnance Department was then prescribing the provisions of Instructions to Bidders as the "usual terms" of its contracts; Form 597, then in use in the Ordnance Department, contained the labor-disputes clause. This contract form was adopted in the Ordnance Department in October, 1917. No change was made in the contract form in use in the Ordnance Department until after the issuance of Supply Circular No. 88, dated September 7, 1918. But this supply circular prescribed the labor-disputes clause for all fixed-price contracts and became effective in the Ordnance Department in October, 1918.

2. As to the three informal contracts involved in these claims—viz, G-1425-788A (claim 3048), R-292-B (claim 3050), and P-3472-1637A (claim 3052)—there is no question as to the authority of the Appeal Section, acting for the Secretary of War, to grant claimant relief. These three contracts are within the purview of the act of March 2, 1919. The intention of the parties was that the labor-disputes clause should be a part of the written contract. Its omission was a mutual mistake. The labor disputes were referred to the Chief of Ordnance by claimant as required by the labor-disputes clause, and the Secretary of War caused an award to be made through his agent, which claimant accepted and carried out in good faith, thereby paying the increased wages, which resulted in a substantial increase in the cost of the articles covered by the contract in question over and above what it would have cost if the increase in wages had not been made. The claimant is now asking to be reimbursed according to the terms of the labor-disputes clause.

3. The first obstacle in the way of granting relief on contract G-1425-788A (claim 3048) is what effect did the attempt to restore this lost contract have on the informal agreement previously entered into between the parties. It will probably never be known whether the six copies of the contract which were signed by Mr. Hoxie and returned to the Ordnance Department were ever executed on behalf of the Government. No copy of this contract was sent to the Returns Office of the Department of the Interior. The evidence, we feel, justifies us in finding that the copies were never signed on behalf of the Government. Therefore at the time the extra copies were executed by Maj. Hawkins there was no formal contract existing between claimant and the United States with reference to Procurement Order G-1425-788A. That attempt to set up or restore the lost contract, if it is to be held valid, operated to create an obligation against the United States where none then existed. As it was done after the armistice and after the necessity for the articles no longer existed, it was, according to the opinion of the Comptroller of the Treasury, void and of no legal effect. (See Decisions of Comptroller, Nov. 25, 1918, vol. xxv, p. 398.) We therefore hold that the attempt to set up or restore the lost contract did not establish a formal contract between the parties. Consequently the situation reverts back to the procurement order dated December 17, 1917. This order is the best evidence of the agreement existing between the parties.

We therefore hold that contract G-1425-788A is not a formal contract, but is an informal contract within the purview of the act of March 2, 1919, and that the best evidence of the agreement entered into between the parties in the procurement order dated December 17, 1917.

4. The only obstacle to granting relief on contract R-292-B (claim 3050) is the Form C certificate dated June 30, 1919, accepted by claimant, and the award accepted by claimant May 21, 1920. The Form C certificate stated that:

"The documents attached hereto constitute a detailed statement showing the nature, terms, and conditions of said agreement."

The document referred to was the proxy-signed contract R-292-B. This certificate constituted an agreement between claimant and the Ordnance Claims Board that the proxy-signed contract expressed the real intention of the parties at the time the agreement was entered into. In other words, claimant thereby admitted that the labor-disputes clause was not one of the provisions of that agreement. However, claimant's acceptance of this certificate, Form C, was not without qualification or reservation. Claimant signed it "Accepted and approved without prejudice." What did this mean? What was its legal effect? At the time this certificate was signed by claimant it had just filed its claim for increased wages paid on this contract. In thus qualifying its acceptance to the Form C certificate it is apparent that claimant did not thereby intend to preclude itself from asserting the present claim for increased wages on the theory that the labor-disputes clause was one of the provisions of the agreement which the Form C certificate was intended to validate. We therefore hold that the qualified acceptance and approval of this certificate, Form C, does not estop claimant from now insisting that the labor-disputes clause was a part of the original agreement.

The next obstacle in the way of claimant's recovery on this claim is the award accepted by claimant May 21, 1920. It purports to be in final settlement and discharge of contract R-292-B. Is the claimant thereby precluded from asserting the present claim? At the time this award was signed by claimant the present claim for \$131,775.95 was pending before Maj. Hawkins, of the Ordnance Claims Board. Clearly claimant did not intend that this award should operate as a release of the present claim. The award was for only \$6,577.44.

Maj. Searles, of the Ordnance Claims Board, and Mr. Van Fossan, of the War Department Claims Board, approved and signed the award without any knowledge that the present claim was still pending. They fully intended that the award should be in final settlement and discharge of contract R-292-B.

The act of March 2, 1919, authorized the Secretary of War to adjust, pay, or discharge agreements of the kind in question upon a fair and equitable basis. Until a fair and equitable settlement has been made the Secretary of War has not done what he is required to do by that act. If an incomplete award has been made there has not been that adjustment, payment, or discharge of the agree-

ment which the act contemplated. The power to make an award carries with it the power to correct an erroneous award. In any case where it is clearly shown that an erroneous award has been made, thereby working a gross injustice on either the Government or the contractor, the award should be vacated and the error corrected, to the end that the purpose of the act shall be accomplished. Proof that an erroneous award has been made must be conclusive. The burden is upon the claimant to show that an error has been made. The presumption is that the final award was fair and equitable. In the instant case the evidence is conclusive that the award in question, in so far as it purports to be in final adjustment, payment, and discharge of the agreement, was not fair and just. The award should, therefore, be vacated in so far as it purports to be a final award.

5. As to contracts P-11350-2872A (claim 3051) and P-12289-3034A (claim 3049) a different question is presented. Both of these contracts are formal. As to formal contracts the Secretary of War has not the authority to grant relief as in the case of informal contracts. The act of March 2, 1919, gives the Secretary of War authority to adjust certain informal agreements, but that act did not relate to contracts duly executed in the manner prescribed in section 3744, Revised Statutes.

Claimant insists that its acquiescence in the wage award constituted an informal agreement within the purview of the act of March 2, 1919; that is, when claimant accepted the award and paid the increased wages there was an implied agreement on the part of the United States to reimburse claimant the added cost of the articles manufactured. We are unable to concur with claimant in this view. When the labor troubles arose claimant thought the labor-disputes clause was in the two contracts in question, as well as in all of its other contracts. Dr. Hopkins made his award July 30, 1918. If claimant at that time knew that the labor-disputes clause was not in any of its contracts it undoubtedly would have insisted on ascertaining whether or not there was to be an increase in the contract price of the articles covered by contracts which did not contain the labor-disputes clause. It is quite apparent that claimant accepted and abided by the award thinking that it was doing so pursuant to the terms of the contracts in question. This negatives the idea of an implied agreement. There could be no intention to enter into a new agreement when claimant then believed that the matter of increased wages was already covered by its contracts.

We therefore hold that as to claims Nos. 3049 and 3051 the Secretary of War is without jurisdiction to grant the relief asked for, and it is accordingly denied. However, this does not preclude claimant from presenting these claims to the Auditor for the War Depart-

ment and to the Comptroller of the Treasury for a reformation of the contracts in question.

DISPOSITION.

1. With reference to claim 150-C-3048 (contract G-1425-788A), claim 150-3052 (contract P3472-1637A), and claim 150-C-3050 (contract R-292-B) the Appeal Section will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Ordnance Section, War Department Claims Board for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division. The basis of settlement will be in accordance with the decision of the Secretary of War in re claim of American Tube & Stamping Co., Board of Contract Adjustment No. 150-C-1979.

2. With reference to claim 150-C-3049 (contract P12289-3034A) and claim 150-C-3051 (contract P11350-2872A), the Appeal Section will enter a formal order denying relief.

Lieut. Col. McKeeby and Capt. Woodfin concurring for the Appeal Section; Mr. Van Fossan concurring for the War Department Claims Board.

FEBRUARY 21, 1921.

Case No. 1970.

In re CLAIM OF JACOB GOLDMAN, RECEIVER FOR GAS OIL CHEMICAL CO.

1. **BASIS OF ADJUSTMENT—TERMINATION CLAUSE.**—Where a contract, formally executed within the meaning of Revised Statutes 3744, contains a clause which provides a method or basis of settlement to be resorted to in event the contract is terminated or suspended by the United States prior to full performance, and the contract is in fact suspended by the United States upon the grounds of public policy (the necessity of the thing to be furnished under the contract having ceased to exist), such settlement, if any, to which the contractor may be entitled shall be made according to the terms of the termination clause of the contract unless it shall appear that a more favorable settlement to the United States may be effected under the various Supply Circulars of the War Department.
2. **CLAIM AND DECISION.**—This is a claim for unworked direct material on hand, unworked material, worked direct material on hand, direct labor and overhead, machinery and apparatus necessary for prosecution of contract, amortization of cost of plant, amount under last condition of cancellation clause, and interest under article 9, and is for \$53,548.01, and is presented to the War Department Claims Board, Appeal Section, under G. O. 103, War Department, 1918. Held, claimant entitled to relief in part.

Maj. Blackburn writing the opinion of the Board.

HISTORY AND ORIGIN OF CLAIM.

The claim of the Gas Oil Chemical Co., West Hammond, Ind., is presented to the War Department Claims Board, Appeal Section, in accordance with G. O. 103, 1918, and is for \$53,548.01. The claim was in the first instance filed with the Chicago district claims board on the 1st day of March, 1919, as one arising under compulsory order No. 360-B/C-P. S. & T., June 20, 1918, which board after numerous hearings and after having considered the voluminous mass of testimony taken at these various hearings, together with the various reports of cost accountants and staff experts, awarded to the claimant the sum of \$40,256.76. The award, together with all papers relating thereto, was forwarded to the War Department Board of Appraisers at Washington, D. C., which board transmitted the same under the memorandum from Col. Christopher Garnett, then chairman of the Board of Contract Adjustment, to Col. E. H. Lehman, then chairman of the War

Department Board of Appraisers. Under this memorandum the Board of Contract Adjustment assumed jurisdiction and proceeded to a determination of the case. On March 22, 1920, the Board of Contract Adjustment in a decision of that date denied the relief prayed for in claimant's original petition. Thereafter claimant filed its petition for rehearing, and the said petition having been considered by the standing committee on rehearings of the Board of Contract Adjustment, granted the prayer of this petition, and a rehearing was ordered. The claim was thereafter set for hearing in accordance with the recommendations of the standing committee, at which claimant was present and represented by counsel. Thereafter, on the 29th of July, 1920, the War Department Claims Board, Appeal Section (successor to the Board of Contract Adjustment), by a decision of that date held as follows:

"The result of our decision is that claimant is entitled to have its contract adjusted under the supply circulars of the War Department, and to be reimbursed for such partly finished product and materials as it had on hand for the performance of its contract at the time of its suspension. It will be noted, however, that under the above rulings the principal items of the claim, i. e., the one for facilities and the one for materials not suitable for the contract are denied."

Thereafter claimant by counsel filed with the War Department Claims Board, Appeal Section, its petition praying for a further hearing in order that it be permitted to introduce further evidence. This petition was referred to the standing committee on rehearings, and after due consideration it was the decision of the standing committee that the petition for rehearing be denied. From this decision an appeal was taken to the Secretary of War. In support of this appeal claimant submitted a memorandum in which the following quoted paragraph appears:

"In conclusion we suggest that the decision should have extended only to the determination of the question of default, and that question having been determined in favor of the claimant the claim should have been referred to the proper board for the taking of testimony as to the various items of the claim, and the claimant should thus have been afforded the opportunities to establish not only the necessity for facilities, but all the items of its claim, including the cost of such facilities and of material purchased to carry the contract into effect."

The entire record was thereupon transmitted to the Secretary of War for consideration. It was the opinion of the Secretary of War:

"That the decision of the Appeal Section of July 24, 1920, be vacated, and that further proceedings be had in conformity with paragraph 9 of the memorandum of the vice chairman, War Department Claims Board."

Paragraph 9 referred to in the order of the Secretary of War is as follows:

"I therefore recommend that the decision of the Appeal Section in this case be vacated, and that the papers be returned to that section to give claimant opportunity to present such evidence as he may have material to his claim; that after full hearing the case be decided by the Appeal Section independently of former decisions or the action on this appeal."

The claim was submitted to the Appeal Section for further hearing on January 29, 1921, at which time claimant was represented by Edward G. Pratt, sr., former president of the Gas Oil Chemical Co., and by counsel.

The history of the rise and origin having been gone into by various other committees of both the Board of Contract Adjustment as well as the Appeal Section, War Department Claims Board, it was considered unnecessary to hear evidence along this line, and the testimony adduced at the hearing of January 29, 1921, was addressed more particularly to the question of facilities, material work and unworked, labor and overhead, and amortization of cost of plant, all of which was set out by items in claimant's amended petition filed with the papers in this case.

As will be seen from the introductory paragraph of these findings of fact, this claim was originally treated as one arising by virtue of Compulsory Order, Purchase, Storage, and Traffic 360 (B. C.), June 20, 1918, and was considered by the Chicago district claims board under the provisions of the act approved March 2, 1919. In order that the issues be clarified, the Appeal Section, War Department Claims Board, now finds that this claim arises by reason of a formally executed contract not under the act of March 2, 1919, and further, that the contract was not canceled for default, that the contract was suspended in the interest of public policy (the need of toluol having ceased to exist) under subdivision 1 of Article XII of the contract. It is provided in the contract in subdivision 2, Article XV, under the subtitle "Disputes":

"If any doubts or disputes shall arise under this contract, they shall be referred to the Chief of Ordnance for determination. If, however, the contractor shall feel aggrieved at any decision of the Chief of Ordnance upon such reference, he shall have the right to submit the same to the Secretary of War, whose decision shall be final."

It is under the foregoing clause of the contract that the Appeal Section, War Department Claims Board, as the agency of the Secretary of War, now assumes jurisdiction to determine the matters now

in dispute. The claim as it is now to be considered consists of eight separate and distinct items, as follows:

1. Unworked direct material on hand-----	\$630. 75
2. Unworked material-----	7, 409. 93
3. Worked direct material on hand-----	918. 00
4. Direct labor and overhead-----	7, 405. 78
5. Machinery and apparatus necessary for prosecution of contract--	4, 090. 72
6. Amortization of cost of plant-----	13, 437. 39
7. Amount under last condition of cancellation clause-----	14, 409. 00
8. Interest under article 9-----	5, 246. 44
Total-----	53, 548. 01

It appears from certain orders entered in the chancery cause of the Westinghouse Traction Breaker Co., a corporation, et al., v. the Gas Oil Chemical Co., a corporation, et al., now pending in the circuit court of Cook County, State of Illinois, that on October 25, 1920, one Jacob Goldman, of Chicago, Ill., was appointed receiver for the Gas Oil Chemical Co. on January 29, 1921. Leave was requested by J. Kemp Bartlett, of Baltimore, Md., representative of the said Jacob Goldman, to substitute the said Jacob Goldman, receiver, for and in the stead of the Gas Oil Chemical Co. It being in the opinion of the Board that such steps would be necessary in order that the proper parties might be before the Board, leave was accordingly granted.

FINDINGS OF FACT.

During the latter part of the year 1917 claimant completed a small plant at West Hammond, Ind., capable of producing for commercial purposes a commodity known as "65 per cent toluol," but no production of this commodity was had until about the 1st of January, 1918, after which time claimant entered into various contracts for the production of toluol for the commercial trade. Their principal sources of supply of raw materials, such as holder, drip, and light oils, was a coke plant at Joliet, Ill., and the Minneapolis Gas Light & Coke Co., of Minneapolis, Minn. Smaller quantities were obtained from certain smaller plants in the territory adjacent to West Hammond.

Early in the year 1918 claimant contracted with the Minneapolis Gas Light Co., of Minneapolis, Minn., for 160,000 gallons of crude material; and in order that the necessity for the use of a larger number of tank cars for transporting the crudes from Minneapolis to West Hammond might be obviated, it was thought practical by claimant, as well as by certain officers of the Ordnance Department, that this 160,000 gallons of crudes be shipped across the river to the plant of the Northwestern Blau Gas Co., at St. Paul, Minn., which had just

completed the installation of a fire still, the plan being to have the crudes run through a process of preliminary distillation at this plant. This was done; and after the material had been subjected to this primary distillation—the resultant product being by this process reduced to approximately one-third of the original gallonage—was shipped in February, 1918, to the plant of the claimant at West Hammond, Ind., to be subjected to the further processes of distillation necessary to the production of a chemically pure toluol.

After this material had been received at the plant of the claimant it was discovered, after several ineffectual attempts, that for some reason or other which was at that time to the claimant unexplainable it was impossible to recover from the crude material that proportion of toluol which should have been obtained. However, claimant did recover from this crude and sold to the commercial trade approximately 30,000 gallons of 65 per cent toluol.

During the month of May, after some correspondence with the Procurement Division, Ordnance Department, at Washington, Edward G. Pratt, sr., president of the claimant company came to Washington and began certain negotiations with Col. Clarence W. Watson, Procurement Division, Ordnance Department, looking to the securing of a contract with the Government for toluol. This period of negotiation extended over several days, and on May 14, 1918, culminated in the execution of ordnance contract P-7924-8958. Under the terms of this contract claimant undertook and obligated itself to the delivery of 100,000 gallons of chemically pure toluol, deliveries to begin on or about July 1, 1918, and to be at the rate of 10,000 gallons monthly for a period of 10 months thereafter. The price which claimant was to receive for its product was fixed in the contract at \$1.50 per gallon. Further provision was to the effect that after the delivery of 100,000 gallons contracted for, the Ordnance Department would have an option on 50,000 additional gallons of toluol at the same rate. Contemporaneous with the execution of this contract, claimant secured an advance payment on the material to be thus produced, from the War Credits Board, amounting to \$30,000.

With the contract and the check in his pocket, the representative of the claimant returned to West Hammond, Ind., to prepare for the fulfillment of this contract.

However, before the contract was executed, and as has been stated in preceding paragraphs of these findings of fact, claimant was experiencing great difficulty in refining the crude material previously received from the Blau Gas Co. An appeal was made to Mr. J. M. Morehead, chief of the Wood Chemicals Section of the War Industries Board, for advice as to what steps, if any, could be

taken to secure a larger yield of toluol from the crude material than that which had heretofore been obtained. Answering this appeal, Mr. Morehead recommended that claimant secure the services of one Edward A. Dieterle, gas and chemical engineer, of Chicago, Ill. Mr. Dieterle was thereupon employed by claimant and visited its plant for the first time on May 16, 1918, two days following the execution of the formal contract between the claimant and the United States. After making certain experiments with the view of securing a larger yield of pure toluol from the crude material, Mr. Dieterle discovered that it was practically an impossibility to do anything with the material then on hand, because of the presence in this material of certain chemicals not ordinarily to be encountered. In order to eliminate these chemicals, Dieterle concluded that certain facilities not at that time owned by claimant, would have to be installed in order to recover all of the toluol. Dieterle recommended the installation of these apparatus to claimant, and as a result of this recommendation claimant on June 19, 1918, contracted with the Edward A. Dieterle Co., of which Edward A. Dieterle was a partner, for the purchase of these facilities and instruments which, according to Dieterle's advice, would not only increase the production capacity of the plant, but which would make it possible for claimant to extract all of the toluol present in the crude material.

These facilities were installed during September and October, 1918. Claimant made no deliveries under its contract until October, 1918, when its first shipment of 2,394 gallons was made. This shipment was accepted and paid for by the United States. No other deliveries of toluol were made by the claimant after the October shipment, and, so far as the record discloses, none was produced. This is borne out by the fact that in the various items claimed for there appears no item for chemically pure toluol on hand and not delivered.

On November 15, 1918, claimant received notice from the Chief of Ordnance suspending all further operations under the contract, assigning as a reason therefor that the further need for toluol for governmental purposes had ceased to exist and that the termination or suspension of the contract was in the interest of public policy. Claimant accepted the notice of termination or suspension and made no further efforts to produce or deliver toluol under this contract.

DECISION.

The Appeal Section, War Department Claims Board, in its decision of July 29, 1920; discusses at length the default of the claimant in not having made its deliveries of toluol to the Government as per the schedule set out in the contract and found that while there was.

in fact, a default upon the part of the contractor such as would amount to a breach of contract, yet the acceptance of the shipment of toluol made in October, 1918, was an acquiescence in the breach, and held that the contract was not subject to cancellation by the United States for the breach but had been terminated in the interest of public policy. We believe this view to be proper and based upon the facts. Therefore, so much of the decision of July 29, 1918, of the Appeal Section, War Department Claims Board, as is applicable to the question of the claimant's default is affirmed. In the event of the termination of the contract by the United States prior to a full performance, a method of settlement was provided. It is stated in Article XII, under the heading "Termination of contract," that—

"This contract, including any extension thereof, may be terminated and canceled by notice in writing to the contractor by the Chief of Ordnance, as follows:

"(1) Because, in the opinion of the Chief of Ordnance, the need for further toluol under this contract has ceased to exist.

"(2) Because of the abandonment or willful or continued violation of this contract by the contractor.

"Upon termination of this contract for the first-named cause the United States shall pay the contractor (a) for all toluol theretofore accepted by the United States, (b) for all such as may (subject to inspection) be ready for delivery, and (c) for all in process of manufacture. In addition, if at the time such notice is given less than 100,000 gallons has been accepted by the United States, there may be added such sum, if any, as the Chief of Ordnance may deem necessary justly to compensate the contractor for its work hereunder. In addition, if at the time such notice was given less than 12,000 gallons has been accepted by the United States, the United States shall pay to the contractor the difference in value between 12,000 gallons and the amount theretofore accepted and paid for by the United States. Any termination of this contract for the second-named cause or causes shall be without prejudice to any other rights or remedies that the United States may have at law against the contractor."

These conditions provide the only means of settlement between the parties to the contract and must govern this Board in the determination of the issues here involved. The position of the claimant is that not only is it entitled to a settlement under the terms of the termination clause of the contract as are enumerated in subdivisions A, B, and C, but in addition it should under the second clause be reimbursed for certain other expenditures and for plant amortization, such reimbursement to be in accordance with the supply circulars of the War Department, and especially in the light of the provisions of Supply Circular No. 111. We believe this provision to be untenable. The securing and execution of the contract with the United States by claimant was a voluntary action upon its part and was for the purpose of securing a market for any and all toluol it

might be able to produce. The contract was the final culmination of the negotiations and bargainings between the claimant and the Government, and in it were merged all prior agreements and understandings, and the parties thereto, in the absence of fraud or mistake, are irrevocably bound by its terms. In the termination clause from which we have previously quoted it is provided that in the event the contract be terminated by the United States before full completion, that they will settle with the contractor upon a certain basis, the contractor agreeing with the United States that in the event of this contingency he would accept the settlement upon this basis, and having so agreed, the claimant must abide by the terms of its obligation. If the termination clause is not sufficiently broad to cover all contingencies which might have arisen under the contract, then it was the duty of the claimant to have seen to it that it did, and if through the lack of good business judgment or for any other cause claimant executed the instrument without having all of the conditions and understandings embodied therein, in that event it was its folly to have done so. But having signed the contract, it can not now but be circumscribed by the limitations therein contained. To resort to any other method or basis of settlement such as the supply circulars of the War Department, between the United States and the claimant would be in effect to read into this contract something which was not contemplated by the parties at the time of its execution and would, in fact, be the act of re-creating and re-forming the contract between the parties when no grounds for reformation or the necessity therefor are shown to exist. It was said by this Board in the case of Templar Motors Corporation, No. 150-C-2883:

“Where a formal contract is suspended by the Government in the public interest and not canceled, the Secretary of War has jurisdiction to adjust it by a supplemental agreement. *If it has a termination clause, such clause is followed in the adjustment, unless it be in the public interest to terminate it in accordance with Supply Circular 111.*” (*Italics are ours.*)

This we think to be a sound enunciation of the principle applicable to the settlement of contracts executed formally, within the meaning of Revised Statutes 3744, and which have been terminated in the interest of public policy, and should be universally followed in such cases unless it shall be clearly made to appear that a settlement under the supply circulars of the War Department will be more favorable to the interests of the Government. We must therefore hold in the instant case that in view of this authority the contract itself is the true medium through which the claimant herein may receive reimbursement, if any, it be entitled to. In addition to subdivisions (a),

(b), and (c) of section 1 of Article XII of the contract, it is provided that—

“In addition, if at the time such notice is given less than 100,000 gallons had been accepted by the United States, there may be added such sum, if any, as the Chief of Ordnance may deem necessary justly to compensate the contractor for its work hereunder.”

This naturally gives rise to the question as to what sum or sums may be necessary to render to the contractor just compensation for its work hereunder. We are not in accord with the contention of claimant that this is a blanket authorization under which the Chief of Ordnance might settle with the contractor upon any basis which he may think proper. If it were in fact blanket authority and if such a construction were to prevail, there would be no limitation upon the amounts of money which might be paid under such a theory. It would seem that the true intent and purpose of this clause when taken in conjunction with the other provisions of the termination clause is limited in its application to matters incident to the work under the contract and applies only to such sums expended and which could be shown to be absolutely necessary to the work and which within all human reason could not have been contemplated by the contractor prior to or at the time of the execution of the contract. If the terms of the contract, including the termination clause, are to control in determining the issues now before us, it is the opinion of the Board that the various items of this claim should be disposed of as follows:

Items 1 and 2 will be considered as one. The first in numerical order is *unworked direct material on hand*, \$630.75; and the second, *unworked material*, \$7,409.93, and are made up in the following manner:

Item No. 1 is made up of 4,450 pounds of caustic soda, 2,900 pounds of sulphuric acid, also crude distillate, all of these materials being on hand at the plant of the claimant at the time the contract was suspended by the Government. The price of the caustic soda was originally figured at 9.5 cents, the market price on the date of the suspension of the contract. The Government auditors, however, used the original invoice of 6.5 cents, reducing the amount claimed for in this item from \$422.75 to \$289.25. The sulphuric acid was checked by Government auditors, and for this item \$58 was found to be correct.

Item No. 2 is made up of 26,469 gallons of light distillate, which claimant received from the Northwestern Blau Co. and placed in storage tanks in its plant at Hammond, Ind. The original cost of this distillate was 50 cents per gallon. This price was based upon

the toluine content of the crude material. Upon suspension of the contract by the Chief of Ordnance the claimant found this material on its hands in its storage tanks. Thereafter it reduced its claim against the United States to the minimum by the sale of the light distillate to the Barrett Co., of New York, at a price of 26.2 cents per gallon, the best price obtainable for toluine bearing oils after the signing of the armistice. It is developed by the testimony that the light distillate claimed for in this item contained approximately 25 per cent toluol. It is further developed by the evidence that the 25 per cent of toluol contained in this distillate was an approximate average of the toluine contained in all other toluine bearing oils obtainable.

There being no provision in any of the subdivisions (a), (b), nor (c) of the second clause of Article XII of the contract for reimbursement for moneys expended under these items, and not coming within the purview of the second clause of paragraph 2 of this article, they are accordingly disallowed.

Item 3. *Worked direct material on hand (\$918).*—This item is composed of that quantity of the crude distillate in process in the stills of claimant's plant at the time of suspension of the contract. This material was never withdrawn from claimant's plant but was allowed to remain in that state in the stills and has been sold as a part of the claimant's plant. The total amount received for the entire plant was \$13,500.

It is not disclosed by the evidence what salvage value was fixed for this material when it was sold, nor is the gallonage shown. It is in evidence that the sum of \$918 here claimed for represents the difference between the original cost price of this material, i. e., \$0.54 per gallon, and its salvage value. We are of the opinion, and so hold, that under subdivision (c) of the second clause of Article XII of the contract claimant is entitled to reimbursement for that amount which represents the difference between the cost or purchase price of the crude distillate and the fair salvage value thereof of whatever material was in process, which is to be determined as to gallonage, cost price, and salvage value as of the date of the termination or suspension of the contract.

Item 4. *Direct labor and overhead (\$7,405.78).*—This item represents the cost of labor and overhead from August 1 to November 15, 1918, and for convenience are divided into two items; first, the item for labor between these two dates, which was \$3,443.05; second, the overhead for this period, which was \$3,962.73. These items have been checked and audited by Government auditors and examiners and this item of claim as is now presented was made up under the direction of the accountants and auditors of the Chicago district

claims board. However, there being no express provision for reimbursement to claimant for such costs as are embraced in this item under any sections, provision or subdivisions of the termination clause of the contract, the Board is of the opinion, and so holds, that this item should be disallowed.

Item 5. *Machinery and apparatus necessary for prosecution of contract* (\$4,090.72).—The items of this claim as made up are several in number, consisting of one 24-inch cast-iron column, certain thermometers, one Tagliabue water control, storage tanks (2), tubular boiler (1), Fairbanks-Morse scale (1), Westinghouse electric compressor (1), the total amount of this expenditure being \$4,215.72. It is disclosed by the evidence in this case that prior to the negotiations between Mr. Edward G. Pratt, then president of claimant company, and Col. Clarence W. Watson, Ordnance Department, U. S. Army, the production capacity of the plant was approximately 200 gallons of chemically pure toluol per day. In order that claimant might perform the conditions of the contract then being negotiated, it was necessary to enlarge the plant by purchase of additional special facilities so as to bring the production capacity of the plant up to approximately 500 gallons daily.

It appears from the testimony of Mr. Edward G. Pratt, sr., that the facilities composing this item were contemplated by claimant prior to the execution of the contract, yet the termination clause of the contract contains no express provision beyond those expressed in Article IX, whereby in event of suspension of the contract by the United States prior to full performance, the claimant could be reimbursed for the unabsorbed portion of the expenditures thus made. We are therefore of the opinion and so hold that this item is not allowable under the second paragraph of Article XII of the contract, and therefore should be denied.

Item 6. *Amortization of cost of plant* (\$13,437.39).—This item is for the sum of \$13,437.39 as plant amortization. There being no provision in Article XII of the contract or any of the subdivisions thereof for plant amortization, this board finds and so holds that claimant is not entitled to the relief prayed for in this item of its claim, therefore this item is disallowed.

Item 7. *Amount under last condition of cancellation clause* (\$14,409).—In addition to the several provisions in the termination clause of the contract which have been heretofore discussed, the third and last paragraph thereof provides as follows:

“In addition, if at the time such notice was given less than 12,000 gallons has been accepted by the United States, the United States shall pay to the contractor the difference in value between 12,000 gallons and the amount theretofore accepted and paid for by the United States.”

From the language of the above-quoted provision it is clear that it is intended to be, and is, in effect, a guarantee to the contractor against minimum production. In other words the United States covenants with the contractor that at all events they will pay for 12,000 gallons of toluol whether this amount be delivered or not. It is obvious that this clause is an insurance to the contractor in event of termination or suspension of its contract against losses incurred in preparation to perform, such as by the purchase of special facilities and other expenditures as were reasonably contemplated prior to the execution of the contract, and for which reimbursement has not been expressly provided in subdivisions A and B of the termination clause of the contract. Adopting this as the true interpretation of this clause, it would seem that the contractor would thus be put in statue quo, it being reasonable to assume that from the price received for that toluol delivered, it would recoup its overhead in proportion to the delivered gallonage. The further purpose of this paragraph is to protect the United States against paying for the same thing twice. In other words, the second paragraph of the termination clause, having provisions for the reimbursement for such expenditures as were necessitated by unforeseen conditions, and the third paragraph providing a means of settlement for such expenditures as were contemplated, it therefore follows that payment for those items of the instant claim which were contemplated and which are set up under the second paragraph of the termination clause were necessarily refused for the reason that these identical items are only allowable under the third paragraph, and in the exact ratio which each item bears to the whole amount so allowed hereunder.

It appears that under the contract claimant has delivered 2,394 gallons of toluol, which has been accepted and paid for by the United States. This item of the claim is for the difference between \$18,000, the value of 12,000 gallons of toluol, and \$3,591, the value of the delivered product, which amounts to \$14,409. The Board holds that the foregoing amount is properly allowable under subdivision C (second paragraph) of Article XII of the termination clause and is the maximum allowable under the contract to the claimant for facilities, specially provided, as well as for other items of expense originally contemplated.

Item 8. *Interest under Article IX of the contract (\$5,246.44).—* Article IX of the contract is as follows:

If the War Credits Board shall require the contractor to pay interest on any advance payment, the United States shall reimburse the contractor therefor as a part of its costs and expenses under this contract; the precise account or method through which such reimbursement shall occur to be determined by the contracting officer.

The amount of interest claimed for in this item represents that amount now due and owing to the United States for moneys advanced to claimant by the War Credits Board. The original amount being \$30,000, has been reduced by certain deductions from the purchase price paid for the 2,394 gallons of toluol accepted by the United States, to \$29,102.25. The amount of interest for which rebate is claimed is computed at the rates of 6 per cent per annum and from the date of the advance made by the War Credits Board up to March 1, 1921.

The Board finds, and therefore holds, that under the terms and provisions of Article IX of the contract claimant is entitled to a rebate of interest on such amount or amounts as may be due and owing to the United States by reason of the advance payment made to claimant by the War Credits Board at the rates of interest provided for in the supplemental agreement and in the following manner:

First. The interest shall be computed from the date the loan of \$30,000 was made to claimant by the War Credits Board to the day and date upon which claimant received credit upon the principal, which credit reduced the principal from the original amount, or \$30,000, to \$29,102.25.

Second. That the interest shall be computed on the \$29,102.25 from the day upon which claimant was so credited up to and inclusive of the day and date of the execution of any settlement contract had hereunder.

Third. Nothing contained in this decision shall be construed to affect the payment of or to relieve the claimant from the payment of any interest or installment of interest such as may be due and owing to the War Credits Board after the execution of any settlement contract which may be had under the terms of this decision. This Board expressly holds that its jurisdiction touching the payment of any interest by the claimant to the United States expressly confined to Article IX of the contract.

DISPOSITION.

It is recommended that the Appeal Section, War Department Claims Board, transmit its findings to the Ordnance Section, War Department Claims Board, and that the items of this claim which have been allowed in the foregoing decision be paid in accordance with the terms of the contract.

Lieut. Col. McKeeby and Capt. Marcum concurring for the Appeal Section; Mr. Van Fossan concurring for the War Department Claims Board.

FEBRUARY 23, 1921.

Case No. 1206.

In re CLAIM OF CHARLES H. MURRAY.

1. JURISDICTION OF THE SECRETARY OF WAR.—Where claimant files with an agency of the Secretary of War two affidavits in which are set out by items his expenditures incurred in a journey made at the instance of the Secretary of War, and the items contained in the two affidavits are so inconsistent as to the amounts of such expenditures as to raise the question of the good faith of the claimant, the Secretary of War should refuse to assume jurisdiction of the claim for the purpose of deciding it upon its merits.
2. Where it appears from all of the evidence, as well as supporting affidavits and documents, that the claimant has either innocently or maliciously sought to take advantage of the United States in the presentation and proof of his claim, the Secretary of War will deny jurisdiction and refuse to make the settlement prayed for.
3. Where the evidence adduced by claimant upon a hearing is of such a contradictory and inconsistent nature as would raise the suspicion of fraudulent intent the Secretary of War will refuse to take jurisdiction and deny the claim.

Maj. Blackburn writing the opinion of the Board.

ORIGIN AND NATURE OF CLAIM.

1. This claim arises under the act of March 2, 1919. Statement of Claim Form B has been filed under Purchase, Storage and Traffic Supply Circular No. 17, 1919, for \$46,000 by reason of an agreement alleged to have been entered into between the claimant and the United States. The claim is based upon an offer made by the Secretary of War to buy platinum communicated by him to the Secretary of Commerce, and by the subordinate officers of the Secretary of Commerce to the claimant. The Secretary of War agreed in this offer to accept such platinum to be furnished by the claimant and to designate a representative at Vladivostok, Siberia, to receive it. The Secretary of War failed to designate such representative at Vladivostok, and claimant was thereby precluded from making a tender to the United States of the amount of platinum he was to furnish under his contract.

2. The claim is for expenses incident to claimant's journey from New York to Vladivostok, Siberia, and return. The claim came on for hearing for the first time before the Board of Contract Adjust-

ment on March 22, 1920, which Board, after having considered all of the evidence and supporting affidavits, as well as other documents at that time submitted, was of the opinion that the claimant was not entitled to the relief prayed for, for the reason that "this Board is unable to find that the claimant was ever in a position to deliver any platinum." Thereafter on April 2, 1920, a final order was issued by the Board of Contract Adjustment denying all relief.

3. Claimant thereupon appealed his case to the Secretary of War, and in pursuance to this appeal, the Secretary of War on August 21, 1920, directed that the claim be returned to the War Department Claims Board, Appeal Section, and "that further proceedings be had in accordance with the accompanying recommendation of the special advisers." The recommendation of the special advisers of the Secretary of War upon which the foregoing order is predicated is as follows:

Appeal to Secretary of War from Board of Contract Adjustment, claim of Charles H. Murray, No. 150-C-1206.

MEMORANDUM.

That there was an agreement between an officer acting by authority and the claimant is undisputed. By it the Government agreed to pay \$95 an ounce for platinum to be procured by claimant and by him delivered at Vladivostok. The amount named was not more than 36,000 ounces and not less than 1,000 ounces. The Government agreed that it would secure the appointment of the consul, or the commanding naval officer at Vladivostok, or some officer designated by the commanding general of the A. E. F. in Russia to act as agent for receiving the platinum. Delivery might be made from time to time, and the time limit was six months, the agreement being made in August, 1918.

There was no express agreement to pay claimant for his expenses in conducting the enterprise, whatever difference there might be between \$95 an ounce and what the platinum cost him would be his compensation.

He proceeded to Vladivostok by way of Japan, was taken ill on the way, and did not reach his destination until the first week in November. He carried his passport, but nothing to show that he was on Government business, because the State Department was averse to anyone (outside of the military forces) carrying anything of the sort with him.

Having nothing but his passport, and being quite properly unwilling to state to anyone not already advised the nature of his business in Siberia, the United States intelligence officer who boarded the steamer took him to the consul. He informed that officer that he was there in conformity with the agreement and asked to whom he should make platinum deliveries. In my opinion neither the testimony of the claimant nor the letter of the consul (who was not examined and made no affidavit) indicates that he there and then un-

dertook to make a tender to the consul. He had nothing then to tender, having been brought direct from the ship to the office. All that he asked for was to be told to whom deliveries were to be made and to be left free to attend to the Government business he had in hand, viz. the finding of platinum to deliver.

It was then discovered that the Government had wholly failed to give the consul any instructions, or even to advise him of the agreement in which he was named in connection with deliveries. Therefore on November 8 the consul cabled (Murray signing and paying the charges) asking that the situation be fully explained to the consul. A reply to this was sent from Washington November 18. Meanwhile claimant had gone to Yokohama. The unsworn statement of the consul intimates that this was of claimant's own motion; I am inclined to accept claimant's testimony that he was constrained to go there by the next steamer. It is not material why he went there. He left his address and money to pay for cable transmission to himself of any answer to the cable in Washington. The reply of November 18 reads: "War Department has agreed to purchase large amount of platinum which Charles Murray expects to obtain." Apparently this was not transmitted to Murray in Yokohama. A subsequent cable from Washington dated November 20, quoted in the Board's opinion, asked the consul to make arrangements for termination of Murray's agreement and on November 21 Washington cabled the latter (care of consul) "cease platinum activities."

That there was an agreement, that claimant entered on its performance in good faith, and that promptly after the armistice the Government terminated it seems quite clear upon the testimony. Under the Dent Act he would be entitled to maintain a claim for expenditures necessarily incurred in endeavoring to carry out the agreement.

The Board dismissed his entire claim on the ground that it was not satisfied that claimant ever was in a position to deliver any platinum: in other words that the evidence indicates that he could not carry out his part of the agreement. When it is remembered that he would meet his obligations under the contract if he made actual tender of 1,000 ounces at any time before February, 1919, this seems rather more than the evidence warrants. Moreover the Government deprived him of the opportunity to show whether he could, or could not, meet his obligations. Had he found when he reached Vladivostok that the consul, or some other officer, was ready to accept deliveries, as the agreement promised, I am not persuaded by the testimony to find that he could not within two or three days thereafter have delivered at least 1,000 ounces.

If this conclusion be reached, I think he should be allowed such necessary expenditures as he can prove—his personal traveling expenses, for example (not including his wife's). The amount of these I do not go into. As to money which he paid out for options to persons who, as he supposed, had platinum to sell, he offers no proof but his own statement, unfortified by any receipt for payment, and declines to give any information as to time, place, and parties by which even cash payments can be checked up. Under these circumstances I think such alleged payments should not be allowed by accounting officers. That the reasons which induce him to hold back this information may be commendable, as between himself and the

persons he dealt with, is not material. It is his misfortune that he is thus circumstanced, but I do not think the Government should be made to reimburse him without information such as it receives from other claimants asking to be reimbursed.

July 28, 1920.

Respectfully submitted.

E. HENRY LACOMBE,
Special Adviser.

I concur in the above recommendation.

R. C. GOODALE,
Special Adviser.

4. Pursuant to the direction of the Secretary of War, the matters in issue were presented to the Appeal Section, War Department Claims Board, successor to the Board of Contract Adjustment, upon a second hearing held on February 7, 1921, upon which day and date claimant was present in person as well as being represented by counsel.

5. For a full finding of fact reference is made to the decision of the Board of Contract Adjustment in this case under date of April 2, 1920.

DECISION.

1. In our decision upon the matters in the present issue we are not only governed and influenced by the evidence submitted by claimant at the second hearing, but by the evidence adduced upon the former hearing as well as the submitted affidavits and other papers of a documentary nature. When this claim was in the first instance presented to the Board of Contract Adjustment there was filed in connection with claimant's petition on Form B a supporting affidavit dated February 11, 1920, in which was set out item by item the various expenses incurred by claimant in his journey from New York City to Vladivostok and return.

2. Upon the first hearing before the Board of Contract Adjustment on March 22, 1920, claimant vouched for the truth and accuracy of each of the several items of expense set out in his supporting affidavit, and by his then contention sought to establish against the United States his claim for the total amount therein set out.

3. On the second hearing before the War Department Claims Board, Appeal Section, on February 7, 1921, pursuant to the order of the Secretary of War, claimant filed a second affidavit, in which the following appears:

"DISTRICT OF COLUMBIA, ss:

"Charles H. Murray, being duly sworn according to law, deposes and says that the following items are to the best of his knowledge, information, and belief a true and correct list of the expenditures made by him in the fulfillment of the United States Government's

commission to him for the purchase of certain platinum; that such expenditures were made between September, 1918, and January, 1919; that they were all necessary in pursuance of his commission to purchase platinum; and that he makes this affidavit for the purpose of having it introduced in the record at the hearing of his claim No. 150-C-1206, before the Appeal Section of the War Department Claims Board on February 7, 1921."

Following this clause are 38 separate items of expense, the amounts of which do not correspond or agree with the items or amounts as set forth in claimant's original affidavit.

4. While we think it unnecessary at this time to go into the several items one by one, yet we think there is one item in particular which should be discussed. In the original supporting affidavit appeared the following:

Item 16. Steamship expenses and traveling, Yokohama to Seattle----- \$750

In the second affidavit, filed on February 7, 1921, there appears the following:

Item 20. Steamship fare, S. S. *Suwa Maru*, Yokohama to Seattle----- \$200

5. From the testimony of the claimant it is disclosed that these items are identical in their nature and cover his return trip from Yokohama, Japan, to Seattle, Wash. In all fairness to the claimant we think it should be said that in the original affidavit the item of expense of \$750 in addition to his own passage included the passage of the wife of the claimant, and that item 20 of the second affidavit is for the actual passage money of the claimant alone, the sum of \$200, the cost of his wife's transportation, having been withdrawn.

6. Yet this being true, and assuming that the sum of \$200 was for the passage of claimant's wife, and after having deducted this amount from the item of \$750, and further deducting from the remainder the sum of \$200, claimant's passage, there still remains the sum of \$350 unexplained and unaccounted for, except \$50 expended for tips. It occurs to us that if the Board of Contract Adjustment in its consideration of the case had been persuaded that the claimant was in position to have delivered platinum to the United States, and had granted the relief then prayed for in claimant's petition, this claim would have gone to the proper bureau board for payment upon the theory that each of the several items as set forth in claimant's affidavit were just and correct, and the bureau board, acting upon such a decision, would within all human probability have certified to the proper disbursing officer these amounts for payment, the result of which would have been that the claimant would have received from the United States under this particular item a sum of money greater than that amount to which he was in truth and in fact justly entitled. Claimant, through the mouth of his counsel, submits to us in explaining the apparent discrepancies between the

amounts as set out in the two affidavits that the original supporting affidavit of February 11, 1920, was prepared hurriedly and in response to an urgent request from the Board of Contract Adjustment that the same be filed with all expedition, and for that reason the affidavit was submitted in form of a blanket claim under which the claimant, in his opinion (counsel's), could at a later date correct, extend, subtract from, or modify the amounts as they appeared therein, and that the second affidavit, filed on February 7, 1921, was in furtherance of this purpose, and that the claim now before us represents only such items of expense which claimant can substantiate by proper proof. As to this statement of counsel we raise no question, but the fact remains that if it is true that the original affidavit was in fact a blanket claim, as is now contended, we can not but question the sincerity of purpose of claimant by his failure or refusal upon the hearing before the Board of Contract Adjustment to reduce the items claimed for in "blanket amount" to such figures as would be the true and correct items of expenditure. We are not persuaded that there is no merit in the present claim, nor are we convinced that the claimant in his presentation of his claim has been actuated by questionable motives, yet the facts in this case are of such doubtful nature that we are loath to adjudicate the matters before us.

7. The Secretary of War, not being clothed with judicial powers under the act of Congress approved March 2, 1919, but being only for the purpose of that statute an administrative officer, it may be said that whenever he is confronted with a case in which it appears that an advantage, however so slight, has perhaps been taken of the United States by a claimant, either innocently or maliciously, he can and should refuse to take jurisdiction of the case for the purpose of deciding it upon its merits, and when such a situation occurs, such claims should be dismissed for the reasons stated.

8. The instant case is one which we believe should be properly submitted to the Court of Claims, should the claimant be so advised.

9. We are therefore of the opinion that for the reasons hereinabove assigned, the Secretary of War should refuse to assume jurisdiction for the purpose of deciding the instant case upon its merits. The relief prayed for in claimant's petition will accordingly be denied.

DISPOSITION.

The War Department Claims Board, Appeal Section, will enter the usual order denying relief.

Lieut. Col. McKeeby and Capt. Marcum concurring for the Appeal Section; Mr. Van Fossan concurring for the War Department Claims Board.

FEBRUARY 25, 1921.

Case No. 3053.

***In re* CLAIM OF HARRY F. HANN, IN BEHALF OF THE WALKER ELECTRIC & PLUMBING CO.**

1. Where the original contract contains a termination clause and a subcontract refers to and adopts the prime contract the subcontractor is entitled to an adjustment of his claim under and in accordance with the provisions of the prime contract in case of suspension by the United States of the work under the prime contract.

Maj. Blackburn writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim, amounting to \$5,713.09, comes before the Appeal Section, War Department Claims Board, on appeal under the provisions of G. O. 103, War Department, 1918, and is presented by Harry F. Hann, prime contractor for and in behalf of the Walker Electric & Plumbing Co., subcontractor. The claim was, in the first instance, presented to the constructing quartermaster at Camp Jackson and was disallowed by him on the ground that no authority for payment of the same existed. A hearing has been conducted by the Appeal Section, at which claimant and its counsel and also representatives of the Construction Section, War Department Claims Board, were present.

2. On February 20, 1918, the United States entered into a formal contract with Harry F. Hann, of Winston-Salem, N. C., said contract being executed on behalf of the United States by R. C. Marshall, jr., lieutenant colonel, Q. M. C., N. A., for

“Addition to hospital, and such other work as he may be directed in writing by the contracting officer to do at Camp Jackson, near Columbia, S. C. (No plumbing included in the above unless specifically directed.)”

3. On February 26, 1918, Harry F. Hann, prime contractor, entered into a contract with the Walker Electric & Plumbing Co., of Atlanta, Ga., as subcontractor, to furnish in the shortest possible time the labor, materials, tools, machinery, equipment, facilities, and supplies, and to do all things necessary for the construction and completion of the “plumbing, heating, electrical work, sewerage, and water-works” for the addition to the hospital to be constructed for the

United States and referred to in the prime contract. It was agreed by the terms of this subcontract that the subcontractor should fulfill and perform such part of the said principal contract for and instead of contractor, said part being mentioned above. The subcontract was drawn, in all respects, similar to the prime contract between Mr. Hann and the United States, and the subcontractor became bound to the prime contractor and to the United States to comply fully with all the undertakings and obligations of the prime contractor under his contract in so far as the work specified in the subcontract was concerned.

4. The claim as presented before the Appeal Section is made up of the following items:

(1) For machines purchased-----	\$1, 198. 03
(2) For repairs to trenching machine, on rental-----	297. 44
(3) For pay roll of superintendent, J. E. Gibbons-----	300. 00
(4) For pay roll of employees, field office-----	1, 900. 00
(5) For R. M. Walker, traveling and hotel expense-----	587. 44
(6) D. A. Farrell, traveling and hotel expense-----	668. 38
(7) S. H. Rogers and L. P. McAuliffe, traveling and hotel expense---	185. 24
(8) J. E. Temple, traveling and hotel expense-----	128. 99
	<hr/>
	5, 265. 52

On the above amount the following fees are claimed as provided in the contracts:

(9) Subcontractor's fee, Walker Electric & Plumbing Co., 6 per cent--	\$315. 93
(10) Contractor's fee, 2½ per cent-----	131. 64
	<hr/>
Total amount of claim-----	5, 713. 09

5. In Article II of the subcontract of February 26, 1918, it is provided that:

“Said principal contract is hereby adopted and made a part of this contract, and a copy thereof is hereto attached.”

6. Article VI of the subcontract reads as follows:

“The subcontractor shall be reimbursed by the contractor in the manner and for the items set out in Article II of the principal contract hereinabove incorporated (except that no part of this contract may be sublet), for such of its actual expenditures in the performance of the work designated in Article I hereof as may be approved or ratified by the contracting officer; and in addition thereto, as full compensation for the services of the subcontractor, including profit and all general or overhead expenses, the contractor shall pay to the subcontractor such sum as the contracting officer may approve and allow the contractor according to the schedule of fees contained in the principal contract, for a fee upon the work hereby included; provided, however, that the amount of fee to be paid by the contractor to the subcontractor shall be fixed according to the schedule contained in Article III of the principal contract, hereto attached, and shall not exceed the fee which, under said schedule, would be allowed a contractor for the work hereby included, if said work had been done under a direct and separate contract. The provisions of the principal contract shall govern the manner and time of determin-

ing the amount to be paid to the subcontractor if and when the same shall have been determined, allowed, and actually paid by the contracting officer to the contractor."

7. In Article II of the prime contract of February 20, 1918, it is stipulated, among other things, as follows:

"Cost of the work.—The contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer and as are included in the following items:

"(a) All labor, material, machinery, hand tools not owned by the workmen, supplies, and equipment necessary for either temporary or permanent use for the benefit of said work; but this shall not be construed to cover machinery or equipment mentioned in section (c) of this article. The contractor shall make no departure from the standard rate of wages being paid in the locality where said work is being done without the prior consent and approval of the contracting officer.

"(b) All subcontracts made in accordance with the provisions of this agreement.

"(d) Loading and unloading such construction plant, the transportation thereof to and from the place or places where it is to be used in connection with said work, subject to the provisions hereinafter set forth, the installation and dismantling thereof, and ordinary repairs and replacements during its use in the said work.

"(e) Transportation and expenses to and from the work of the necessary field forces for the economical and successful prosecution of the work, procuring labor, and expediting the production and transportation of material and equipment.

"(f) Salaries of resident engineers, superintendents, timekeepers, foremen, and other employees at the field offices of the contractor in connection with said work. In case the full time of any field employee of the contractor is not applied to said work, but is divided between said work and other work, his salary shall be included in this item only in proportion to the actual time applied to this work.

"(j) Such proportion of the transportation, traveling, and hotel expenses of officers, engineers, and other employees of the contractor as is actually incurred in connection with this work."

8. Article VIII of the prime contract reads as follows:

"Abandonment of work by contracting officer.—If conditions should arise which in the opinion of the contracting officer make it advisable or necessary to cease work under this contract, the contracting officer may abandon the work and terminate this contract. In such case the contracting officer shall assume and become liable for all such obligations, commitments, and unliquidated claims as the contractor may have theretofore, in good faith, undertaken or incurred in connection with said work; and the contractor shall, as a condition of receiving the payments mentioned in this article, execute and deliver all such papers and take all such steps as the contracting officer may require for the purpose of fully vesting in him the rights and benefits of the contractor under such obligations or commitments. The contracting officer shall pay to the contractor

such an amount of money on account of the unpaid balance of the cost of the work and of the fee as will result in the contractor receiving full reimbursement for the cost of the work up to the time of such abandonment, plus a fee to be computed in the following manner: To the cost of the work up to the time of such abandonment shall be added the amount of the contractual obligations or commitments assumed by the contracting officer, and such total shall be treated as the cost of the work; upon which the fee shall be computed in accordance with the provisions of Article III hereof. When the contracting officer shall have performed the duties incumbent upon him under the provisions of this article, the contracting officer and the United States shall thereafter be entirely released and discharged of and from any and all demands, actions, or claims of any kind on the part of the contractor hereunder or on account hereof."

9. On April 22, 1919, the Government suspended or curtailed the work at Camp Jackson, and Harry F. Hann, the prime contractor, in turn, suspended or curtailed the same work and notified the subcontractors accordingly, including the Walker Electric & Plumbing Co. The prime contract and the subcontract have been completed by performance except as to so much of the work as was abandoned or curtailed, and the Walker Electric & Plumbing Co. received payment in full in accordance with the terms of the subcontract for all work performed except the items involved in this claim.

10. The prime contract contains the usual clause providing for settlement of doubts, or disputes, by the Secretary of War as to the meaning or interpretation of anything appearing in the contract. The items composing the claim will be considered in the order stated and further findings of fact will be incorporated in the decision.

DECISION.

1. *Item (1).*—For machines purchased, \$1,198.

Mr. R. M. Walker, president of the subcontractor, Walker Electric & Plumbing Co., testified that this item was for one Curtis pipe-treading machine and one stationary kerosene engine and one 5-ton chain hoist, all of which were purchased by the Walker Electric & Plumbing Co. and paid for by said company. He further testified that said machines were ordered for the work contemplated in the subcontract and were necessary for the completion of said work. The understanding between the Walker Electric & Plumbing Co. and the constructing quartermaster as to this equipment was that if it should be furnished by the subcontractor it would be put in service on a rental basis. Claimant contends that the work at Camp Jackson was terminated before any of the articles were used on the job, and that therefore no benefit accrued to the subcontractor whatever from the purchase of this equipment. He further testified that this ma-

chinery is now held in storage by claimant. The receipted bills for this equipment appear in the record and the subcontractor has never been reimbursed for same. The use of this equipment never went into the construction work contemplated by the subcontract. The Government never received any benefit from it. Following the principle announced in the decision of the Board of Contract Adjustment in the Selden-Breck Construction Co. case, No. 2446, of date May 23, 1920, and which was affirmed by the Secretary of War January 15, 1921, we are of the opinion that claimant is not entitled to be reimbursed the amount of the expenditures embraced in this item.

Item 2.—For repairs to trench machine, on rental, \$297.44.

The subcontractor had a trench-digging machine at Camp Jackson used in connection with the work specified in the subcontract. The machine was brought on the job in good condition, and while being used at Camp Jackson certain parts of the machine were broken or got out of repair. This rendered it necessary for claimant to have an expert mechanic come from Newton, Iowa, to do the necessary repairs. The railroad fare for this mechanic from Newton to Camp Jackson and return was \$95.74; his hotel expenses while in Columbia on this repair work were \$57.70; and he worked 18 days, at \$8 a day, \$144. These items appear to be reasonable charges, and all have been paid by the subcontractor. In our opinion, the claimant is entitled to reimbursement for same.

Item 3.—For pay roll of superintendent, J. E. Gibbons, \$300.

This item was originally for \$400, but was revised by Capt. Brown, constructing quartermaster at Camp Jackson, and reduced to \$300 by him, which amount he agreed to allow. Mr. J. E. Gibbons was general superintendent on the job at Camp Jackson. We are of the opinion that this item comes clearly within the provisions of the contract, is a proper one, and should be allowed.

Item 4.—For pay roll of employees, field office, \$1,900.

This item is for the salaries of Mr. L. E. Temple, auditor for claimant, and a stenographer during the time they were closing up the work and records at Camp Jackson after the work had been abandoned, which extended over a period from July 1, 1919, to January 31, 1920. It appears that this item was disallowed in the first instance on account of there not appearing to have been an authorization covering these expenditures. Capt. Joe C. Brown, constructing quartermaster at Camp Jackson, first verbally authorized the employment of Mr. Temple and the stenographer after suspension of the work and later confirmed same by letter of date, February 25, 1920. Capt. Brown also testified at the hearing that as constructing quartermaster at Camp Jackson he authorized the continuance of this field force, and that he deemed it to the best interest and benefit

of the United States to continue this force in the field, and that, in his opinion, the charge was a proper one. However, this authorization of Capt. Brown was after the armistice, and we are not convinced that reimbursement for such expenditures is authorized by any provision of either the subcontract or of the prime contract, and we therefore recommend that same be disallowed.

Item 5.—Mr. R. M. Walker's traveling and hotel expense, \$587.44.

Mr. Walker testified that this item was for his personal hotel bills and traveling expenses actually incurred in connection with his work under this subcontract, and that the same were necessary in order to see that the work was being properly and expeditiously carried forward. He was located in Atlanta, Ga., and it was necessary for him to go back and forth from Atlanta to Camp Jackson. He testified that the expenses so incurred as represented by this item were reasonable and had been paid by him. We are of the opinion that this item is properly allowable under paragraph (J) of article 2 of the original contract, but before any award is issued covering the amount supporting vouchers or receipts or other satisfying evidence showing payment should be required by and submitted to the Construction Section.

Item 6.—Mr. D. A. Farrell's traveling and hotel expense, \$668.38.

Mr. Farrell was president of the Farrell Heating & Plumbing Co., Atlanta, Ga., and by some understanding with the Walker Electric & Plumbing Co., the subcontractor, he would make visits from Atlanta to Camp Jackson to inspect the work and see that it was being carried on as expeditiously as possible. He made these trips and incurred the expense covered by this item for and at the request of Mr. Walker, and the Walker Electric & Plumbing Co. have paid for same. We are of the opinion that this item is properly allowable under paragraph (J) of article 2 of the original contract, but before any award is issued covering the amount supporting vouchers or receipts or other satisfying evidence showing payment should be required by and submitted to the Construction Section.

Item 7.—S. H. Rogers and L. P. McAuliffe, traveling and hotel expenses, \$185.24.

It appears that this subcontractor was engaged in construction work at several other camps at the same time he was performing his contract at Camp Jackson. Mr. Rogers was employed by the subcontractor as auditor to supervise the office work at all the camps. Mr. McAuliffe was employed by the subcontractor as a mechanical engineer to supervise the work at all the camps. Their traveling expenses in going from one camp to another were apportioned between the various camps, and the amount of this item was charged to Camp Jackson. We are of the opinion that this item is properly

allowable under paragraph (J) of article 2 of the original contract, but before any award is issued covering the amount supporting vouchers or receipts or other satisfying evidence showing payment should be required by and submitted to the Construction Section.

Item 8.—L. E. Temple, traveling and hotel expenses, \$128.99.

Mr. Temple was the auditor for the subcontractor at Camp Jackson. After suspension of the work he came to Washington at the request of a Mr. Burns in connection with the Camp Jackson project. It does not appear that claimant had anything to do with his trip to Washington nor does it satisfactorily appear that his trip was "in connection with this work" as contemplated in the contracts. We are accordingly of the opinion that this item should be disallowed.

Item 9.—Subcontractor's fee, Walker Electric & Plumbing Co., on total of the above items, 6 per cent, \$315.93.

Item 10.—Contractor's fee on total of above items, 2½ per cent, \$121.64.

These two items are based upon the amount of the claim as presented. In view of the disallowance of certain items of the claim, the fee or compensation represented by these items should be revised so that the fee in each instance would be based upon the items allowed by this decision and in accordance with the schedule of percentages set out in Article III of the prime contract.

2. Before the issuance or payment of any award herein the prime contractor, Mr. Harry F. Hann, should be required to present satisfactory evidence of having paid the subcontractor, the Walker Electric & Plumbing Co., or the written consent of said subcontractor to look for his compensation and reimbursement to said prime contractor only, in accordance with paragraph 4 of the act of March 2, 1919, entitled "An act to provide relief in cases of contracts connected with the prosecution of the war, and for other purposes."

DISPOSITION.

The Appeal Section, War Department Claims Board, will transmit the entire file in this case, together with this decision, to the Construction Section, War Department Claims Board, for its information and appropriate action.

Lieut. Col. McKeeby and Capt. Marcum concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

FEBRUARY 26, 1921.

Case No. 3034.

In re CLAIM OF THE COMMERCIAL BANK OF SPANISH AMERICA (LTD.).

1. **FORMAL CONTRACT.**—Where no expenditures have been made or no obligations incurred upon the faith of a formal contract, relief will be denied. The Secretary of War has not authorized the bureau boards to adjust claims based on formally executed contracts or informal contracts except where expenditures have been made or obligations have been incurred upon the faith of the same.
2. **FOREIGN CORPORATION LICENSED TO DO BUSINESS IN THE STATE OF NEW YORK.**—A foreign corporation organized under the laws of the Kingdom of Great Britain and Ireland, but licensed to maintain an agency and transact business in the State of New York, is to all intents and purposes a domestic corporation, and does not come under Section III of the act of March 2, 1919, relating to contracts entered into between the United States and nationals of a foreign country.
3. Held, relief denied for the reasons stated above.

Maj. Farr writing the opinion of the Board.

FINDINGS OF FACTS.

The Board finds the following to be the facts:

1. This claim is again before the Appeal Section on appeal by claimant from the action of the Air Service Section, War Department Claims Board, under date of October 22, 1920, disallowing the claim on the following grounds:

“1. That this claim does not come within the provisions of Section III of the act of March 2, 1919, and therefore this Board has jurisdiction to adjust the same.

“2. That this claim be disallowed, due to the fact that the claimant has failed to furnish proof of expenditures and obligations incurred by the claimant under the contract of September 17, 1918, for which the United States is legally responsible.”

2. This claim was before the Board of Contract Adjustment, now the Appeal Section, on a former occasion, and on April 3, 1920, a decision was rendered by that board referring the claim back to the Air Service Claims Board—

“In order that petitioner, if he sees fit, may present to that board such bona fide proof of expenditures and obligations made by peti-

tioner under the contract of September 17, 1918, as may properly be used as a basis by the Air Service Claims Board in adjustment and settlement of said contract."

3. As the decision of the Air Service Claims Board of October 22, 1920, was to the effect that claimant had failed to furnish proof of expenditures made and obligations incurred upon the faith of the contract, the Appeal Section decided to afford claimant a further opportunity to submit satisfactory proof of any expenditures made and obligations incurred upon the faith of said agreement. Hearings were held on December 1 and December 6, 1920. At the conclusion of these hearings claimant was requested to furnish certain documentary evidence, i. e., the original or certified copies of all written agreements between the Commercial Bank of Spanish America (Ltd.) and Angel Caligaris, and also the original or certified copies of all invoices, receipts, etc., relative to expenditures made and obligations incurred by the bank and by Mr. Caligaris relative to the growing of castor beans in Nicaragua during the year 1918. Claimant has now complied with that request and insists that it has furnished everything that it is possible for it to furnish.

4. The Commercial Bank of Spanish America (Ltd.) is a foreign corporation organized under the laws of the United Kingdom of Great Britain and Ireland, with its principal office in London, England. It has branch banks or agencies in the United States, and also in Central and South America. At the time the contract in question was entered into between claimant and the United States claimant was licensed, under section 27 of the banking laws of New York, to maintain an agency in the State of New York at No. 49 Broadway, New York City, and to transact thereat business of buying, selling, paying or collecting bills of exchange, issuing letters of credit, receiving money for transmission and transmitting the same by draft, check, or otherwise, and making sterling or other loans, as authorized by section 145 of the banking laws of New York.

5. On September 17, 1918, claimant entered into a formal contract with the United States (Air Service Contract No. 4684, Purchase Order No. 810031), by the terms of which claimant was to furnish to the United States Air Service 90,000 minimum to 110,000 maximum bushels castor beans at \$3 per 46-pound bushel, f. o. b. vessel at port of shipment, Nicaragua, Central America, deliveries to be as follows:

- 25,000 prior to December 15, 1918,
- 25,000 between December 15, 1918, and March 15, 1919.
- 25,000 between March 16, 1919, and June 15, 1919.
- 25,000 between June 16, 1919, and July 31, 1919.

This contract was entered into between the Bureau of Aircraft Production and the manager of claimant's New York branch. After the contract had been executed the New York branch manager cabled the manager of claimant's branch at Managua, Nicaragua, to the effect that the contract had been closed.

6. On November 14, 1918, the Bureau of Aircraft Production wrote claimant's New York branch as follows:

"1. Owing to recent developments, it is requested that you do not make any additional purchases, or any additional plantings or sub-contracts for the planting of castor beans for the Government account.

"2. It is further requested that you furnish this bureau at your earliest convenience a statement showing the acreage of castor beans that you now have under cultivation. Also a statement showing the quantity of beans which you have purchased to apply on this Government contract and are obliged to take."

On November 15, 1918, claimant replied to the above letter as follows:

"We are in receipt of your favor of yesterday's date with regard to above contract.

"We regret that we are unable to give you the information requested from here, but we are at once applying for same to our client abroad and will be pleased to hand it to you immediately on receipt."

Claimant endeavored to furnish the information requested in the letter of November 14 above quoted, and did furnish the Air Service Claims Board with a statement of the expenditures alleged to have been made by Mr. Caligaris. The claim was originally filed in the name of Mr. Caligaris, but when it later developed that the contract was between the United States and the Commercial Bank of Spanish America (Ltd.), the name of the bank was substituted for that of Mr. Caligaris, he not being a party to the contract with the United States.

7. The evidence now before the Appeal Section shows that early in 1918 Mr. Angel Caligaris, a coffee grower of Nicaragua, decided to undertake the growing of castor beans in Nicaragua on an extensive scale. He made arrangements with claimant's branch bank at Managua to finance him in this venture to the extent of about \$30,000. The evidence was to the effect that for a number of years the bank had financed Mr. Caligaris in the growing of coffee on his plantation and had acted as his broker or commission agent in selling the coffee, charging him a commission of 5 per cent on all sales, in addition to interest on the money advanced. The transaction with reference to the growing of castor beans was on the same basis. It does not appear that the bank took any security for the money advanced to Mr. Caligaris. The bank was simply to receive 12 per cent

interest on all money advanced and also a commission of 5 per cent on all sales of castor beans.

Having made arrangements to finance a large castor-bean crop, Mr. Caligaris entered into contracts with five associates or partners, by the terms of which he was to advance to them funds necessary to plant, cultivate, and harvest castor beans on the land owned or rented by them. Advances by Mr. Caligaris to his partners were made weekly and in sums sufficient to meet the payrolls. The contracts between Mr. Caligaris and his partners provided that he was to dispose of the castor beans and was to receive from 50 to 70 per cent of the net profits realized. These contracts were entered into in the spring of 1918 and were to expire in June, 1920, thus covering a period of two crop years.

Mr. Caligaris also entered into contract with about 50 small growers, by the terms of which they were to grow castor beans for Mr. Caligaris. He obligated himself to purchase all the beans grown by them during the year 1918 at \$1.40 per bushel.

8. The evidence is to the effect that Mr. Caligaris planted about 700 acres of his own land to castor beans; his partners planted about 950 acres, and the small growers planted about 1,250 acres. Apparently all of the work of preparing the ground, planting the seed, etc., had been done before the contract in question was negotiated between claimant and the United States.

9. In the summer of 1918, when the prospects indicated a considerable crop of castor beans, claimant bank began to negotiate for the sale of the beans which it was then expected would be grown by Mr. Caligaris and his associates. It does not appear that the name of Mr. Caligaris was ever mentioned during the negotiation between claimant and the officer who represented the Bureau of Aircraft Production. The bank at all times appears to have been acting in the capacity of principal and not in the capacity of agent or commission merchant for Mr. Caligaris.

10. When claimant's New York branch notified its Managua branch that the contract had been closed Mr. Frederick Goodchild, manager of the Managua branch, called Mr. Caligaris into the bank and notified him that the contract with the United States had been closed and informed him that the price was \$3 per bushel. It seems that Mr. Caligaris already knew of the negotiations which were being conducted by the bank with the Bureau of Aircraft Production.

11. About the time above noted, or shortly thereafter, but prior to November 14, 1918, Mr. Caligaris was in need of further advances from the bank for the purpose of cultivating the castor beans and possibly to pay for sacks purchased, and as a consideration for further advances the bank required him to agree to the payment of a

further commission of 5 per cent on the sales of castor beans, thus making the bank's commission 10 per cent. If the castor beans had been delivered to the United States, the bank's commission would have been approximately \$30,000.

12. There is no evidence that Mr. Caligaris entered into any additional contracts for castor beans after the date the contract was entered into. The sacks which were ordered may have been ordered after that date. The bank did not make any expenditures nor incur any obligations with anyone, with the possible exception of Mr. Caligaris, upon the faith of the contract in question.

13. When claimant's New York branch received the suspension request of November 14 it cabled notice thereof to its Managua branch, and that branch got in touch with Mr. Caligaris to ascertain how much he had spent on the castor-bean venture up to that date. On November 27, 1918, Mr. Caligaris reported to the branch that he had spent up to that time a total of \$47,500, and that he had bought 4,000 bushels of castor beans from various parties. These were beans which he had already obligated himself to buy.

Since November 27, 1918, claimant has succeeded in securing from Mr. Caligaris what purported to be a detailed statement of his expenditures on the castor-bean venture. When the claim was before the Board of Contract Adjustment on April 3, 1920, Mr. Caligaris was insisting that he be reimbursed the sum of \$65,340.20. At the present time claimant is asking that it be reimbursed the sum of \$71,971.77. This latter sum includes a profit of 10 per cent which Mr. Caligaris is asking for. The bank is not asking for any reimbursement for itself. All it is asking for is the amount claimed by Mr. Caligaris.

14. When the United States requested the bank to suspend the contract and the bank notified Mr. Caligaris to that effect, the crop had not been harvested. As there was practically no market for castor beans after the armistice, most of the growers in Nicaragua abandoned their castor-bean crops. Very few beans were harvested. Mr. Caligaris purchased beans to the amount of \$14,405, being beans he had already obligated himself to buy. These beans were sold for \$41,891.11. Due credit has been given for the profits realized on these beans. They were not sold to the United States. There have been no beans sold or tendered to the United States, as the bank agreed to the suspension of the contract.

15. The revised statement shows that subsequent to January 15, 1919, Mr. Caligaris spent \$14,022.98 in clearing his own land of castor-bean stalks, etc., and that he advanced to his partners the sum of \$12,596.43 for the same purpose.

DECISION.

1. The evidence shows that, although claimant is a foreign corporation, it is licensed to maintain an agency in the State of New York. It may sue and be sued in the courts of that State and in the United States courts as if it were a domestic corporation. To all intents and purposes, therefore, claimant is a domestic corporation. Consequently, it does not come within the provisions of section 3 of the act of March 2, 1919, relating to contracts entered into between the United States and nationals of foreign Governments. This claim will therefore be considered as being based on a contract entered into between the United States and a domestic corporation.

The contract in question being a formally executed contract in accordance with the provisions of section 3744 Revised Statutes, the claim does not come within the purview of the act of March 2, 1919.

2. As the contract was suspended by mutual agreement at the request of the United States, the situation at present is one in which the two parties to the contract are negotiating for a settlement thereof for the purpose of canceling it. The contract contained no termination clause.

The bank insists that it be reimbursed the full amount that Mr. Caligaris is asking reimbursement for. Mr. Caligaris is asking for reimbursement for the full amount he claims to have been lost on the castor-bean venture.

Clearly the amount lost by Mr. Caligaris should not be the basis of negotiating a cancellation of this contract. He could as easily have lost \$500,000 on his castor-bean venture if he had gone into it on a larger scale.

3. The bank does not insist that it made any expenditures or incurred any obligations upon the faith of the contract, except perhaps a small amount expended for cablegrams, etc. To do so would be to admit its obligation to Mr. Caligaris. The bank will, of course, not admit that it obligated itself to buy 100,000 bushels of beans from Mr. Caligaris at \$2.90 per bushel, when it knew he was buying beans at only \$1.40 per bushel. The bank may be liable to him, but that is not a question for us to decide. However, it is our opinion, and we accordingly find, that any liability incurred by the bank to Mr. Caligaris was incurred before, and not after, the bank entered into the contract in question with the United States. Prior to the execution of that contract Mr. Caligaris was clearly under an obligation to the bank to sell his beans through the bank and to pay the bank a commission of 5 per cent. If he had sold the beans to any other person he would nevertheless have had to pay the bank the 5 per cent commission. As the bank was under obligation to deliver approximately 100,000 bushels of beans to the United States, it would, of

course, never have consented for Mr. Caligaris to dispose of his beans to anyone else. This was the only visible supply in Nicaragua, and the bank would then have been unable to fulfill its contract with the United States.

4. The only authority delegated by the Secretary of War to the bureau boards to negotiate settlements of claims arising out of contracts entered into by the War Department is where the contractor has made expenditures or incurred obligations upon the faith of the contract between it and the United States. This prerequisite to the adjustment of claims holds regardless of whether the claim is based upon an informal contract within the purview of the act of March 2, 1919, or is based on a formal contract properly executed as required by section 3744, Revised Statutes.

5. In the instant case, the contractor having made no expenditures and having incurred no obligations upon the faith of the contract in question, we are without authority to grant the relief asked for, and it is accordingly denied.

DISPOSITION.

A final order denying relief will be entered.

Lieut. Col. McKeeby and Capt. Taylor concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

FEBRUARY 28, 1921.

Case No. 3026.

In re CLAIM OF NEW YORK AIR BRAKE CO.

1. **MERGER.**—Where a formal cost-plus contract providing, among other things, for increased facilities is later amended by an informal supplemental contract increasing the amounts that can be spent for special facilities, and is in turn again amended by a formal supplemental contract providing for greater additional increased facilities, the first informal supplemental contract is merged in the second formal supplemental contract, and the contracts before this Board for construction are therefore formal contracts and the act of March 2, 1919, can not be applied to the settlement of the same.
2. **CONDITION PRECEDENT.**—Where a formal contract has a clause providing that the same can be terminated if the public interest shall require, and in that event the contractor shall be paid 10 per cent of the amount of materials, etc., on hand not in the course of manufacture, and has a further clause providing that in case of such termination the contractor be in default, upon the statement in writing of the contracting officer that the contractor has in good faith used his best efforts in the performance of the contract he shall be paid a compensation of not more than 10 and not less than 5 per cent of the amount of such materials, and the evidence shows the contractor to be in default it is a condition precedent that before any payment can be made to the contractor upon such termination of the contract that the contracting officer shall certify in writing that the contractor has used its best efforts to perform the contract in accordance with the terms thereof.
3. **APPEAL.**—Where no such statement in writing has been made by the contracting officer, but the district ordnance claims board and the Ordnance Section, War Department Claims Board, have stated in their opinion that the contractor has used his best efforts in the performance of his contract, upon appeal to this Board by the claimant, the same is a repudiation of the decision of the district ordnance claims board and the Ordnance Section, War Department Claims Board, and the claim comes before this Board de novo and without any expression of opinion from anyone that the contractor has used his best efforts in the performance of the contract, and this Board is within its rights in saying that in its opinion the contractor has not used its best efforts in the performance of the contract.
4. **DELAYS.**—Where a formal contract has a clause providing that the contractor shall be paid in accordance with certain provisions thereinbefore set out in case the continued performance of the contract "is prevented by acts of war, riots, or incendiarism, or other causes beyond the control and without the fault of the contract which may be directly traceable to the war now existing between the United States and Germany," and the said performance is not prevented by acts of war, riots, or incendiarism, the said clause must be construed to mean acts analogous to acts of war, riots, or incendiarism and does not include the delays claimant suffered by inability to secure prompt delivery of material or supplies or to secure an adequate force of labor.

5. DOCTRINE OF "EJUSDEM GENERIS."—Where the enumerated excuses for the nonperformance within the time limit of the contract are acts of war, riots, and incendiarism and is then followed by the general phrase "other causes beyond the control and without the fault of the contractor which may be directly traceable to the war now existing between the United States and Germany," and none of the enumerated excuses of war, riots, or incendiarism happen, but claimant was delayed by his inability to promptly get materials, labor, etc., the general causes following the enumerated causes can not be extended to the extent necessary to include the alleged failure to secure materials, supplies, etc., promptly. If the general phraseology could cover all the causes in fact beyond the contractor's control it would cover the expressly enumerated causes and their inclusion in the contract would be ineffective and meaningless, and it can not be presumed that the specific provisions would have been stated if they were covered by the general provisions, and the entire paragraph must be so construed as to allow each portion thereof to have its full and adequate effect. The doctrine of "ejusdem generis" (of the same nature) is applicable to this case and the words following the enumerated words must be construed to include only causes that were of the same nature as war, riots, or incendiarism and can not include the other delays complained of by the contractor. This rule is clearly stated in the case of *Mich. v. Russell* (136 Ill. 22, 26 N. E. 528): "By application of the maxim 'ejusdem generis' (of the same nature) general and specific words which are capable of an analogous meaning, being associated together, take color from each other, so that the general words are restricted to a sense analogous to the less general."

6. INTEREST.—Where a contract provides that the cost of increased facilities of articles for which the United States shall pay shall be in accordance with Ordnance Department pamphlet "Definition of Cost Pertaining to Contracts," dated June 27, 1917, which is attached to and made a part thereof, which pamphlet under paragraph 47 provides only for the payment of interest on investment or bonded debts and for money borrowed to finance the purchase of materials necessary to complete the contract, no interest can be paid claimant on various balances due it by the United States even though claimant is correct in its allegation that it expended its own money for the purchase of materials for the United States Government and thereafter borrowed money to take its place. The contract, being a formal contract, must be strictly construed and this Board can not go outside of its plain provisions.

Maj. Farr writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is a claim for \$732,635.59 and is before this Board on appeal from a decision of the Ordnance Section, War Department Claims Board, that was in part favorable to the claimant. The claim arises under a formally executed contract dated the 14th day of June, 1917, and a proxy signed supplemental contract of May 17, 1918, and a second formally executed supplemental contract of August 27, 1918. This claim was originally filed as a class A claim

and should be handled as a claim arising out of a formally executed contract, but seems to have been handled by the Ordnance Section, War Department Claims Board, as a claim under the act of March 2, 1919.

2. For a proper consideration of this case it is necessary for us to quote the following articles of the original contract of June 14, 1917:

"ARTICLE 1. The contractor agrees to make for the United States the following articles:

"Four hundred (400) 3-inch gun carriages, model of 1916, complete, except the sights, panoramic sights, range scales, angle of sight scales, scroll gears and parts, longitudinal levels, complete, hand fuze setters and cases therefor, padlocks with the necessary clevices, bolt snaps, chains and rings attached, as well as the extra bolt snaps, chains and rings, counter recoil springs, wheels and parts, armor plate, axle seat cushions, horizontal oilers, lock washer holders, wrenches, 0.625 and 0.875 spanners for 56" wheels, tool kits, and canvas, hereinafter called 'the articles,' each of the articles being referred to as 'unit,' in accordance with 'Instructions to Bidders and General Specifications Governing the Manufacture and Inspection of Gun Carriages, Artillery Vehicles, and Similar Ordnance Material, Form 434, revised March 15, 1917,' 'Special Specifications Governing the Manufacture of 3-inch Gun Carriages, Model of 1916, Form 527, revised April 25, 1917,' and 'List of Ordnance Office Drawings,' hereto attached and made a part hereof, and such changes as may be made therein as hereinafter provided, and conditions in this contract set forth."

* * * * *

"ARTICLE 2. Time being of the essence, the contractor agrees to provide, with the utmost dispatch, at the best prices obtainable, (1) such administrative, purchasing, manufacturing, and accounting organization, (2) such plant, machinery, tools, and other facilities, including such as are in addition to the contractor's normal facilities (hereinafter called increased facilities) provided, however, that the cost to the United States of such increased facilities shall not exceed \$750,000, together with (3) such labor, material, supplies, and the like, as may be necessary to enable the articles to be made and the storage and delivery of the articles contemplated herein to be complied with. All proposed expenditures relating to the performance of this contract, which are to be paid for by the United States as hereinafter provided, are subject to such approval as the contracting officer may from time to time require the contractor to obtain. The contractor in dealing with parties other than the United States shall make all subcontracts, purchases, payments, and other arrangements for performing this contract in his own name and for his account, and shall not bind or purport to bind the United States, except as the contracting officer shall otherwise in writing direct. All property paid for by the United States shall upon such payment become the property of the United States. The United States may from time to time furnish the contractor with any such increased facilities, material, supplies relating to the performance of this contract, provided, however, that the contractor's undertakings for such made in good faith are not thereby interfered with.

"ARTICLE 3. The contractor agrees to deliver the articles according to the following schedule:

50 within 6 months from date of this contract.

50 additional within 7 months.

55 additional within 8 months.

60 additional within 9 months.

60 additional within 10 months.

60 additional within 11 months.

65 additional before July 1, 1918.

"Time being of the essence, the contractor will if possible and if requested so to do by the contracting officer anticipate the foregoing schedule, and agrees to give the performance of this *contract precedence over all work for parties other than the United States* * * *. [*Italics ours.*]

"ARTICLE 4. The United States will make the following payments to the contractors:

"(1) The sum of \$800 for each unit delivered as a fixed profit shall be paid upon the proper certificate of the inspecting and receiving officer showing delivery and acceptance thereof.

"(2) The cost of increased facilities as allowed and determined in accordance with article 5 hereof shall be paid from time to time upon the proper certificate of the inspecting and receiving officer either to or upon the order of the contractor as the contracting officer may direct, against the delivery of increased facilities or any part thereof to the contractor, or in the event that such increased facilities are furnished by the contractor, upon delivery by the contractor.

"(3) The cost of the articles as allowed and determined in accordance with article 5 hereof shall be paid each month (as early in the month as possible) upon the proper certificate of the contracting officer, for the expenditures by the contractor on account of such cost during the preceding month or months.

"The United States shall make all payments promptly on or before the 15th of the month, and to this end may attach a paymaster in the main office or plant of the contractor, and shall so do if payments are at any time unreasonably delayed. The United States may make more frequent payments for any lawful purpose, and to the end that sufficient money may be retained to cover any deductions from fixed profit, liquidated damages, if any, or differences as to cost payments, may withhold such percentage of fixed profit and payment of final costs as may be sufficient for such purpose. No payments by the United States shall act to prevent the United States from later disputing the validity thereof under this contract.

"ARTICLE 5. The allowances of the cost of increased facilities and of the articles for which the United States shall pay shall be in accordance with the Ordnance Department pamphlet 'Definition of Cost Pertaining to Contracts, dated June 27, 1917,' hereto attached and made a part hereof.

"In addition thereto further allowances of cost from time to time may be made by the contracting officer.

"The determination of the actual costs as allowed shall be made by the contracting officer, who shall from time to time instruct the contractor as to (1) the methods to be followed in determining actual

cost, (2) the submission of statements thereof, bills therefor, and all other supporting papers, (3) the submission of engineer's and accountings' certificates, and (4) such additions to the allowance of cost and such regulations and instructions with regard to their determination as from time to time shall be adopted by the Chief of Ordnance, or as may be required, in order to enable the contracting officer to issue his proper certificate for payment thereof.

"The decision of the contracting officer on all questions of the allowance and determination of costs and the payment thereof shall be final, except that either upon the completion of the contract by the contractor or its termination by the United States, or whenever claims of cost amounting in the aggregate to \$25,000 shall have been disallowed or determined adversely to the contractor by the contracting officer the contractor may appeal to the Chief of Ordnance by filing one statement of claim which shall embrace all claims of cost previously disallowed or determined adversely, provided all such claims shall be certified by an accountant designated by the contracting officer, as being in their entirety the subject of expenditure of, or cost to, the contractor. The decision of the Chief of Ordnance shall be final upon such appeal.

* * * * *

"ARTICLE 7. It is agreed that the contracting officer may, by written notice to the contractor, make changes in the drawings and specifications forming part of this contract.

"ARTICLE 8. The United States shall have the right to order within the period of six months after the date of this contract, and the contractor shall thereupon supply additional articles under the terms of this contract, not to exceed one hundred per cent of the quantities contracted for, upon the same terms as to fixed profit and other payments, except for facilities, or at such reasonable advance upon fixed profit as may be fixed by the contracting officer; the articles to be delivered upon the dates fixed by the contracting officer or as near thereto as the contractor's best efforts will allow * * *.

"ARTICLE 9. In the event of failure or probable failure of the contractor to comply with the terms of this contract, or any of them, or in the event that in the opinion of the Chief of Ordnance the *public interests so require*, this contract may be terminated by notice in writing to the contractor without prejudice to any claim the United States may have against the contractor. * * *

"In the event of the termination of this contract as aforesaid, the United States shall pay to the contractor all costs of the contractor allowed and determined.

"In addition thereto the United States shall make the following payments, depending upon the contractor's performance:

"(1) In the event that the contractor *shall not be in default under this contract at the date of such termination, the contractor shall be paid a sum equivalent to ten per cent (10%) of all cost except the cost of material, supplies, and the like, raw and not in process of manufacture by the contractor*, allowed and determined, which the United States shall have previously paid and shall then be obligated to pay, less all fixed profits theretofore paid in accordance with paragraph 1 of article 4.

"(2) In the event that the contractor shall be in default under this contract at the date of such termination, but in the opinion of the contracting officer, expressed in writing, shall have in good faith used his best efforts in the performance of the contract, then the ten per cent (10%) of cost less fixed profits as determined in the foregoing paragraph (1) shall be decreased to such extent, but not below five per cent (5%), as may in the opinion of the contracting officer fairly measure the service of the contractor, and such additional payment only shall be made to the contractor.

"The foregoing provisions with respect to payments to be made by the United States upon the termination of this contract shall also apply in the event that the continued performance by the contractor of this contract is prevented by act of war, riots, incendiarism, or other causes beyond the control and without the fault of the contractor which may be directly traceable to the war now existing between the United States and Germany, without, however, relieving the contractor from further performance whenever the effect of such causes shall be removed. (Italic ours.)

* * * * *

"ARTICLE 16. Except as this contract shall otherwise provide, any doubts or disputes which may arise as to the meaning of anything in this contract, the matter shall be referred to the Chief of Ordnance for determination. If, however, the contractor shall feel aggrieved at any decision of the Chief of Ordnance upon such reference, he shall have the right (save only as to the allowance and determination of costs as provided for in article 5 hereof) to submit the same to the Secretary of War, whose decision shall be final."

3. The informally executed supplemental contract of May 17, 1918, after reciting the execution of the contract of June 14, 1917, simply amends the said contract, as follows:

"ARTICLE 1. The parties hereby agree that article 2 of said original contract be amended so as to provide that the cost of the increased facilities shall not exceed the sum of \$950,000 instead of \$750,000.

"ARTICLE II. All other provisions of the agreement dated June 14, 1917, shall remain in full force and effect."

4. The second formally executed supplemental contract of August 27, 1918, amends and supplements the original contract of June 14, 1917, and the supplemental contract of May 17, 1918, in Article I, as follows:

"ARTICLE I. The maximum cost of seven hundred fifty thousand (\$750,000) dollars for the increased facilities, as provided for in Article II of the original contract, dated June 14, 1917, and increased to nine hundred fifty thousand (\$950,000) dollars by first supplemental agreement dated May 17th, 1918, is hereby increased to one million ninety-seven thousand two hundred seventy-eight (\$1,097,278) dollars.

* * * * *

"ARTICLE V. Except as herein modified, all the terms and conditions of the agreement dated June 14th, 1917, as supplemented by first supplemental agreement dated May 17th, 1918, shall remain in full force and effect."

5. Claimant filed its claim before the Ordnance Claims Board on the 28th day of June, 1919, and on June 22 and 23, 1920, was granted a hearing before the said Board, which, on the 19th day of July, 1920, rendered a decision, the following set-up showing the amount claimed by the New York Air Brake Co. and the allowance of said Board:

Claim consists of:

	Claim recommended by Rochester District Claims Board and by Special Committee Ordnance Sec- tion, War Department Claims Board.	
	Claimed.	Allowed.
(1) Claims for other compensation:		
(a) Interest on cash advanced by contractor to purchase materials, supplies, equipment, etc., and which was not promptly reimbursed by United States.....	\$51,396.95	None.
(b) Pay for men employed on Christmas Day, 1917.....	1,050.97	\$1,050.97
(c) Increased salaries, etc., eliminated from administrative expense....	20,187.67	None.
(d) Compensation to cover 10 per cent on material in process claimed under termination clause estimated.....	200,000.00	7½ per cent. ¹
(e) Additional compensation for services rendered to July 1, 1918.....	360,000.00	None.
(f) Estimated amount included to cover other contingencies.....	100,000.00	None.

¹ On cost.

Contractor to be allowed to submit proper items of claim.

6. The Rochester district claims board recommended under (b) the payment of \$1,050.97 on account of men employed on Christmas Day, 1917, and under item (d) 7½ per cent interest, which decision was concurred in and confirmed by the Ordnance Claims Board, and it is from this decision claimant has appealed.

7. Claimant in its appeal alleges that it is entitled to the amount set up under item (a) as being 6 per cent interest advanced by it in the purchase of materials, supplies, and equipment, being interest on the outstanding balances which the contractor had invested in materials, etc., for its contract from July 31, 1917, to May 31, 1919, and that the same was money advanced by the claimant for the United States Government, and that for every dollar so advanced it was compelled to borrow from the banks other money at 6 per cent to take its place.

8. In its appeal claimant has made no mention of item (c), as the same was withdrawn at the time the claim was presented to the Ordnance Claims Board and will not now be considered by this Board.

9. On page 4 of the report of the Ordnance Section it is stated that the hearing of June 22 and 23, 1920, was for the purpose of determining the following questions:

First. Whether the New York Air Brake Co. was in unexcused default under the terms of its contract.

Second. Whether the New York Air Brake Co., in good faith, used its best efforts in the performance of the contract.

Third. What percentage of profit should be allowed in the event that the contractor had, in good faith, used its best efforts, but was nevertheless in default under the contract.

10. The claimant alleges that it was not in inexcusable default under the terms of its contract, and that it did use good faith in an effort to perform its contract, and that it is therefore entitled to the full 10 per cent asked under item (*d*), and that the Ordnance Section was in error when it failed to allow the same, and further alleges that delays incident to the completion of this contract were due to its inability to obtain the necessary materials, machines, tools, skilled labor, the delay of subcontractors in furnishing materials, and to the influenza epidemic that decreased its working force and naturally curtailed its production, also that the directions of the Fuel Administrator further decreased their production, which delays were excusable delays coming within the following language of Article IX:

“Shall also apply in the event that the continued performance by the contractor of this contract is prevented by acts of war, riots, incendiarism, or other causes beyond the control and without the fault of the contractor which may be directly traceable to the war now existing between the United States and Germany.”

And that the claimant was further delayed in the performance of its contract by the various changes in the design by the Government, which changes the claimant was compelled to comply with in the manufacture of the guns, and that the Government monopolized the market for materials and supplies that were necessary to the claimant in the performance of its contract.

11. The sum of \$360,000 and \$100,000 referred to in items (*e*) and (*f*) of the decision of the Ordnance Section have not been insisted upon by the claimant in its petition for appeal, though in the hearing before this Board on the 24th day of January, 1921, it refused to withdraw said items of its appeal, and stated that it desired a decision upon the same. The argument advanced by the claimant for the allowance of the \$360,000 is that the contract in question was a use and occupancy contract, because they were not allowed to fulfill it in accordance with their undertakings, that they are therefore entitled to the \$360,000. The \$100,000 is simply stated as being to cover other contingencies that may not have been specifically set up in the other items. At the hearing before this Board no evidence was taken, it being agreed between the attorney for the claimant and the Government attorney that the case would be submitted on the evidence taken before the Ordnance Section, War Department Claims Board, and the various files in the case.

12. The two supplemental contracts above referred to are not involved in the questions presented except in so far as they have bearing upon the question of whether or not the contracts under which claim is made are formal or informal contracts. The claimant in its brief alleges that, by reason of the execution of the first informal supplement and the later execution of the formal supplement, the contracts under which it bases its claim thereby become informal contracts and the same should be settled under the terms, provisions, and intent of the act of March 2, 1919.

DECISION.

1. We deem it necessary to first decide the formality or informality of the contracts under which claimant is demanding payment. In its brief it asserts—

“In the case before you the contract consists of three separate and distinct papers and the complete contract can not be proven without proving each of the papers. They are all, in fact, in evidence in the proof of this claim. One of those papers is an informal agreement, and is informal because its execution was not in the manner prescribed by law. Its *validity* has been cured by a subsequent agreement ratifying it and formally executed, but its *informality* can now never be remedied. It would have been remedied had the last agreement, in addition to being formally executed, contained all the terms of the contract, but that was not done. A sealed instrument is one which is all under seal. The moment it is modified by a simple contract it is, so to speak, corrupted into a lower form of contract, which can not be eradicated, except by the execution under seal of the original contract as modified. In the same way a contract consisting of two formal papers and one informal paper, is an informal contract. It must be wholly formal or it is informal. It is tainted with informality in the same way that a man with one-eighth Negro blood in his veins is not and never can become a white man.”

We can not agree with the claimant in its contention, for the second supplemental contract being a formally executed contract, by referring to the supplement of May 17, 1918, and by the very nature of the amendment thereby embodies and takes into it as a formal contract all of the provisions of the said first supplemental contract, so that the only resultant contract before this Board for consideration is the original contract of June 14, 1917, as amended and supplemented by the contract of August 28, 1918. As soon as the second supplemental contract was executed the first supplemental contract was thereby eradicated and wiped out, as the very purpose and intent of the said supplemental contract of May 17, 1918, was merged and swallowed up in the more comprehensive terms and stipulations of the contract of August 28, 1918. Therefore the only contract that can be considered by this Board is the said original contract of June 14, 1917, as amended by the second supplemental contract of August

28, 1918, and both being formal, must be construed in strict accordance with their plain intent and meaning, and this Board can not go outside of the said terms and write into the said contracts any remedies that are not plainly granted by their terms.

2. It is an elementary principle of law that a contract of lesser dignity is swallowed up and becomes merged into a subsequently executed contract of greater dignity, to wit, the informal supplemental contract of May 17, 1918, is swallowed up and merged into the subsequently executed contract of August 27, 1918. As was said by Elliott, Volume III, paragraph 1981:

“Merger of one contract in or by another may be said to be the unavoidable destruction of the operative force of one contract by another of higher degree. In other words, merger causes one contract to absorb, ‘swallow up,’ or supersede another, i. e., the second to become a substitute for the first.”

3. This doctrine was announced in the Symington Machine Corporation, Case No. 2512, decided by this Board July 21, 1920, which case on appeal to the Secretary of War was by him confirmed on the 11th day of January, 1921. In that case the Board, in discussing the merger of a prior contract in a subsequent contract, stated—

“It is an elementary principle of the law of contracts, that where there are two or more contracts relating to the same subject matter, of progressing degrees of formality, that all of the provisions of the less formal contract are merged in the subsequent and more formal. As for instance: The provisions of a contract not under seal are merged into the subsequent contract, with respect to the same subject matter, but under seal.” (Elliott on Contracts; Vol. III, page 141; also p. 142.)

4. As was said in *Rhodes v. Chesapeake, etc., Ry. Co.* (49 W. Va., 494):

“If two agreements of different dates, made between the same parties and covering the same subject matter, are inconsistent, the one earlier in date is impliedly discharged by the other. (Clark Con., 611.)”

“A written contract merges all prior negotiations and expresses the final agreement of the parties, and a party thereto may not deny that it expresses the agreement unless his signature was procured by fraud. (139 S. W., 243.) (*Birdsall v. Natl. Surety Co.*, 169 Mo., 479.)

“Where the first modification of a grading contract reiterated a provision for liquidated damages for delay in completion, but a subsequent modification did not contain such provision, Held, that the last modification abrogated the provisions for liquidated damages. (166 S. W., 532.) (*Scott v. Parkview Realty & Imp. Co.*, 255 Mo., 76).”

“A subsequent contract between the parties expressly ratifying all the preceding transactions, in the absence of fraud or deception

inducing it, is at least a prima facie settlement of all previous matters. (144 N. W., 367.) (*Barnes v. Century Savings Bank*, 165 Iowa, 14.)”

5. If we apply the foregoing citations of law to the contracts in question, there can be no doubt of the complete merger of the first supplemental contract in the second. Claimant and the Government voluntarily agreed to adopt, in lieu of the provisions of the first supplemental contract, the larger and more comprehensive terms of the second supplemental contract, and the claimant has been settled with in accordance with the terms and the provisions of the second supplemental contract for all expenditures made by it for special facilities. The matters here in dispute must therefore be considered as arising out of formal contracts and the provisions of the act of March 2, 1919, do not apply.

6. The item of \$1,050.97, amount paid by claimant for work on Christmas Day, 1917, and set up in its original claim under Item (a) has, since the filing of the said claim, been reimbursed. This item will therefore not be considered by this Board, as the claimant has been completely satisfied on account of the said expenditure.

7. The item of \$360,000 must be disallowed. Not only has no proof been presented by claimant to establish the equity of any such claim, but this Board is of the opinion that the same is unconscionable and is based on no provision of the contract. To allow the claimant any such sum of money would be to pay it more profit than would have accrued to it if it had completed and delivered to the United States Government the 400 gun carriages called for under the original contract.

8. The item of \$100,000 set up by claimant to cover any item it had specifically failed to set out is also disallowed, as there is no evidence before this Board that would justify it in making any such allowance.

9. In the hearing before the Ordnance Claims Board the evidence was reported and the transcript is before us and has been carefully considered as well as the various papers attached to the files and the argument and brief of the attorney of the claimant. The item that has been most strenuously asserted by the claimant is its request for an increase of the 7½ per cent allowed it by the Ordnance Section, War Department Claims Board, under the provisions of paragraphs 1 and 2 of Article IX, which are as follows:

“(1) In the event that the contractor shall not be in default under this contract at the date of such termination, the contractor shall be paid a sum equivalent to ten per cent (10%) of all cost except the cost of material, supplies and the like raw, and not in process of manufacture by the contractor allowed and determined which the United States shall have previously paid and shall then be obligated to pay,

less all fixed profits theretofore paid in accordance with paragraph 1 of article 4.

"(2) In the event that the contractor shall be in default under this contract at the date of such termination, but in the opinion of the contracting officer expressed in writing shall have in good faith used his best efforts in the performance of the contract, then the ten per cent (10%) of cost less fixed profits as determined in the foregoing paragraph (1) shall be decreased to such extent, but not below five per cent (5%), as may in the opinion of the contracting officer fairly measure the service of the contractor, and such additional payment only shall be made to the contractor."

10. From our examination of the evidence this Board is of the opinion that the claimant did not in good faith use its best efforts as was contemplated it would use at the time it entered into the contract. We do not say that the claimant is guilty of any bad faith, but it is our opinion that, considering the size of its organization, the high degree of efficiency it asserted it had prior to the date of the signing of the contract, the statements made to the Ordnance Department by its president at the time it was negotiating for the contract, the knowledge it had of the absolute necessity for the prompt production of the gun carriage in question, and its failure to produce the same within the time limit of its contract, even admitting for the sake of argument that it was unable to secure supplies or labor with the reasonable dispatch it had been able to prior to the war, and notwithstanding all of the difficulties that the claimant was confronted with, a more strict supervision over the gun carriage shop and the detail of men from the air brake department to the gun carriage shop would have resulted in a material increase of production and would have been what was contemplated in the language of paragraph 2 of Article IX the use of its best efforts. The best efforts in the contemplation of the Government representatives at the time of the entering into of the contract meant the whole-hearted effort of the claimant to do everything within its power to complete the said contract within the time limit and to produce the carriages that were so badly needed by the Government. The evidence, to our mind, does not establish that the claimant did use such efforts, but rather that the claimant gave its best efforts to the performance of its air-brake program and other contracts it had on hand.

11. The contractor was admittedly in default. This Board does not believe that the difficulty of obtaining materials or labor excused it from the performance, nor do we believe that the mere fact that contracts entered into between the Government and other contractors creating a scarcity of materials was such a monopoly by the Government as in anywise relieved the claimant from the performance of its solemn obligation to secure the materials and to perform the contract within the time limit. The fact that claimant did secure the

materials is evidence that the Government did not have a monopoly of the same and the case of *U. S. v. Pect* (102-264 U. S. Report), relied on by claimant, is not in point.

12. Claimant at the time it entered into the contract with the Government knew of the conditions confronting it and solemnly undertook and agreed to perform the contract in accordance with its terms and within the time limit, and the changed conditions during the performance of the contract are not such as excused it from the performance of the same in accordance with its terms.

13. The law relative to the change of conditions after the signing of the contract and during the time of performance that will not excuse a contractor from compliance with the same is correctly stated in the decision of the *Phoenix Bridge Co. v. United States* (38 Court of Claims, p. 510).

"It is, we think, in such cases, elementary law, needing no authority in support of it, that if a party contracts to perform anything which is possible at the time when the contract is made, but afterwards becomes an impossibility, he is liable in damages resulting from nonperformance thereof. The distinction is that if an obligation be *imposed by law*, and does not arise from *his contract*, if it be rendered impossible afterwards by the act of God, or by the act of the Government, he will be excused for nonperformance. In the case presented the obligation does arise from the contract of the party, and does not therefore fall within the exception of things rendered impossible by the act of God. The rule is that if a person desires exemption from such acts it must be so provided in the contract (Story on Contracts, sec. 975; Chitty *id.*, 1074), and there is no pretense that such was done in the present case."

See also *Sun Printing & Pub. Asso. v. Moore* (183 U. S. 642, 46 L. ed. 366) and *Carnegie Steel Company v. United States* (240 U. S. 156, 60 L. ed. 576).

14. The claimant being in default, before the conditions of paragraph 2, Article IX, under which claimant is demanding the payment to it of 10 per cent of all cost of material, supplies, and the like, raw and not in process of manufacture, can apply, it is a condition precedent that the contracting officer shall express in writing his opinion that the contractor has in good faith used his best efforts in the performance of the contract. No such opinion in writing is in the papers, nor has claimant alleged or attempted to prove that any such opinion has been expressed in writing, and this Board does not believe that the Ordnance Claims Board succeeded to the powers and authority of the contracting officer for the purpose of expressing such opinion, but even if the said Ordnance Claims Board had such powers and could, in lieu of or in the place of the contracting officer, express such an opinion as would, under the provisions of the said paragraph entitle claimant to payment in accordance with its terms,

claimant by appealing from the said decision of the Ordnance Claims Board has repudiated its findings and brings this case before us de novo, with no expression of opinion from anyone that the contractor had in good faith used its best efforts in the performance of the contract in question. The contractor can not take part of the decision of the Ordnance Claims Board and refuse to accept the balance, but must reject it in toto or accept it as a whole.

15. If it is the contention of the claimant that the Ordnance Claims Board succeeded to the rights of the contracting officer and had the power and authority to state in writing that claimant had used its best efforts, then upon the refusal of the claimant to accept the decision of the Ordnance Claims Board the same is vacated in lieu of a decision from this Board confirming it, and this Board, upon a review of all the evidence, files, and the facts, refuses to confirm said decision and is of the opinion, as hereinbefore expressed, that the claimant has not in good faith used his best efforts in the performance of the contract.

16. This Board is further of the opinion that the delays complained of by the contractor on account of its inability to comply with the tolerances of the specifications for the machining of the gun carriages in question and the subsequent granting of over 600 changes in tolerances by the Government in no wise entitles it to relief, because the allowance or granting of the 600 tolerances in question was for the specific purpose of making it easier for the contractor to produce and was to his benefit. At the time Mr. Shaw was negotiating for this contract he represented that the New York Air Brake Co. was well equipped for the purpose of performing this contract, and he stated in paragraph 8 of his letter of May 29, 1917:

"8. Similarity of our regular work: In the manufacture of airbrakes it is necessary for us to work to one-thousandths of an inch and the parts of the airbrake equipment are of necessity interchangeable, many of the pieces are fully as exacting and difficult of design as the work we have seen in connection with the above gun carriages."

17. Even if the contention of the claimant is correct that it was delayed by changes, it was granted an extension of six weeks. The letters in the file show that the claimant, when other changes were made, advised the Government that it would need no extension of time by reason of any extra work necessitated by change in specifications.

18. In the opinion of this Board the following language of the closing paragraph of Article IX:

"The foregoing provisions with respect to payments to be made by the United States upon the termination of this contract shall also apply in the event that the continued performance by the contractor of this contract is prevented by act of war, riots, incendiarism, or

other causes beyond the control and without the fault of the contractor which may be directly traceable to the war now existing between the United States and Germany, without, however, relieving the contractor from further performance whenever the effect of such causes shall be removed."

does not justify it in saying that the claimant is excused from the performance of its contract or should be considered in excusable default by reason of the delays it alleges it suffered due to the congestion in traffic or scarcity of materials and labor that it states was caused by the war with Germany. The intent of this paragraph was simply to provide for the payment to the contractor in accordance with the other provisions of paragraph 2 of Article IX *in case the continued performance* of the contract became impossible. The continued performance of this contract as contemplated in this paragraph never became impossible, as the contractor was continuing to perform up to the time of the suspension, so that the conditions set forth in this concluding paragraph have not arisen.

19. The enumerated causes that would excuse the contractor from the continued performance of the contract were acts of war, riots, and incendiarism, none of which ever occurred. The contractor, however, contends that the general phraseology included other causes beyond its control and without its fault and directly traceable to the then existing war and should therefore include shortage of labor, inability to secure materials, and sickness among employees. The general clause following the enumerated causes can not, however, be extended to include these delays. If the general phraseology could cover all causes in fact beyond the contractor's control it would also cover the expressly enumerated causes, and their inclusion in the contract would be ineffective and meaningless. It is not, however, to be presumed that the specific provisions would have been stated if they were covered by the general provisions, and the entire paragraph must be construed so as to allow each portion thereof to have its full and adequate effect. The rule of construction called "*eiusdem generis*" is applicable. This rule is clearly stated in the case of *Mich. v. Russell* (136 Ill. 22, 26 N. E. 528) :

"By application of the maxim '*eiusdem generis*' (of the same nature), general and specific words which are capable of an analogous meaning, being associated together, take color from each other, so that the general words are restricted to a sense analogous to the less general."

It is therefore our opinion that the "other causes" contemplated by this provision of the contract must therefore be construed to include only causes of the character specified which are similar to those expressly enumerated in the same sentence and under no construction can be considered as including the causes that the contractor alleges

are responsible for his delay and directly traceable to the war with Germany. All relief asked for under any provision of Article IX is denied.

20. The item of \$51,396.95 demanded by the claimant as interest on cash advanced by the contractor to purchase materials, supplies, and equipment, and which was not promptly reimbursed by the Government, is likewise denied. Article 5 of the contract provides that the cost of increased facilities and the articles for which the United States shall pay shall be in accordance with Ordnance Department pamphlet "Definition of Cost Pertaining to Contracts," dated June 27, 1918, which is attached to and made a part of the contract. Paragraph 47 of this pamphlet provides:

"47. Interest on investment or on bonded debt shall not be considered as an expense entering into the cost of contracts for the United States, but the contracting officer will reimburse the contractor for interest paid by it on money borrowed to finance the purchase of materials necessary to complete contracts for the United States. Interest cost will not be considered as a cost to the contractor upon which profit is to be calculated."

The contractor is therefore limited to interest paid by it on money borrowed to finance the purchase of materials necessary to complete contracts with the United States. The claim set up by claimant for interest is not for interest it paid on money borrowed to finance the purchase of material, but is for interest claimant alleges should be paid it on various balances, it alleging that it expended its money for the purchase of materials and thereafter found it necessary to borrow money to replace the money so expended. This is not such an interest charge as the contract provides should be reimbursed claimant, and this Board can only construe the contract under which claimant was working and can not read into its terms any different language. The terms are positive, plain, and unambiguous, and in nowise provide for the reimbursement to claimant of any such interest charges as are here presented by it.

21. The claimant has been paid a profit of \$800 per gun, or a total of \$77,600, and in addition thereto all expenditures for special facilities and the further sum of \$2,406,372 for materials, supplies, etc. If claimant had completed the contract in question it would only have received a possible profit of \$320,000. The contract was less than 25 per cent completed at the time of its suspension. If claimant was allowed to recover, in addition to the profit of \$77,600 already paid it the additional sum now claimed under the provisions of paragraph 2 of Article IX there would be paid to it a total profit of approximately \$240,637.20 on a contract that was less than 25 per cent completed, which is out of proportion to any benefit derived by

the United States Government from the work performed by the contractor.

22. For the foregoing reasons all relief asked for by the claimant is denied.

DISPOSITION.

A final order denying relief will issue.

Lieut. Col. McKeeby and Capt. Frazer concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

FEBRUARY 28, 1921.

Case No. 3037.

In re **CLAIM OF WINCHESTER REPEATING ARMS CO.**

- 1. PLANT AMORTIZATION.**—Where claimant enters into several cost-plus contracts with the United States for the manufacture of rifles and munitions and the plant and plant facilities used in the manufacture of same were previously constructed and installed for the performance of contracts which claimant had with foreign Governments, claimant is not entitled to have the expenditures made in installing said plant and facilities amortized over its contracts with the United States.
- 2. SAME.**—Nor will such expenditures made as set out in paragraph 1 be treated as an element of cost under the "Definition of Cost" pamphlet issued by the Ordnance Department June 27, 1917.
- 3. AMORTIZATION, DEFINITION OF—DISTINGUISHED FROM DEPRECIATION.**—Amortization means extinction of debt, usually by a sinking fund, while depreciation is to be considered as an element of expense allowable on the property owned and used by the contractor in connection with the manufacture of the articles contracted for.
- 4. CONTRACTS, REPRESENTATION AS TO CAPACITY TO PERFORM.**—The United States, unless the contract expressly provides to the contrary, assumes that the contractor has a plant, office organization, and capital adequate for the performance of the contract, and nothing appearing to the contrary, a fair inference is that the contractor, by his act of entering into the contract, represents to the United States that he has a plant, equipment, facilities, and capital sufficient to complete performance in accordance with the terms of the contract.

Maj. Blackburn writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim, amounting to \$693,526.88, is presented in accordance with G. O. 103, War Department 1918. The claim was originally submitted to the Bridgeport claims board and was disallowed. The entire file and claim was thereupon transmitted to the Ordnance Section, War Department Claims Board. From a decision of that section, October 12, 1920, disallowing the claim, an appeal was taken to the Appeal Section, War Department Claims Board. On December 30, 1920, the Appeal Section rendered a decision denying claimant relief, from which decision an appeal was taken to the Secretary of War. The case has been returned to the Appeal Section with an ac-

companying memorandum from the vice chairman, War Department Claims Board, January 28, 1921, in which it is stated:

"After preliminary investigation of this case, it is my opinion that the decision as heretofore rendered is not properly responsive to the contention of claimant herein.

"I, therefore, direct that the case be returned to you for further hearing and a decision which will be responsive to the contention of the claimant and which is in conformity with all the facts as developed."

A hearing has been conducted by the Appeal Section at which claimant and its counsel were present.

2. The facts and circumstances under which the claim arises are as follows: The Winchester Repeating Arms Co., claimant, has for many years maintained and operated at New Haven, Conn., a plant for the manufacture of guns, rifles, pistols, cartridges, and munitions. At the outbreak of the World War in 1914, the plant investment of claimant amounted to, in round numbers, \$8,500,000. At that time claimant entered into contracts with the British and Russian Governments for the manufacture of rifles and munitions which necessitated enormous expansion of its plant, so that on the 31st day of December, 1916, the plant investment of claimant amounted to, in round numbers, \$19,000,000. When the United States entered the war, in April, 1917, the Winchester Repeating Arms Co. was already equipped and prepared with a plant and plant facilities for the manufacture of rifles, cartridges, and munitions, and because of the plant facilities that then existed the Government adopted what is known as the modified Enfield rifle.

3. After the United States became involved in the war it entered into numerous contracts with the claimant for the manufacture of rifles, pistols, and munitions. Some of these contracts were on a fixed-price basis, while others were on a cost-plus basis. The claim in this case as presented is for special plant amortization apportioned by claimant over seven cost-plus contracts. Counsel for claimant particularly specified that no claim was made under the act of March 2, 1919 (the Dent Act).

"Maj. BLACKBURN. Of course if no part of your claim is based under the Dent Act, or the act of March 2, 1919, it does not become important or material as to the presentation of any claim under that act. I understand that you say you make no claim at all under the Dent Act?

"Mr. BRIGHT. None at all, sir.

"Maj. BLACKBURN. Consequently, the question of presentation of the claim prior to June 30th does not enter into it at all?

"Mr. BRIGHT. Not at all, sir.

"Maj. BLACKBURN. Any claim that you might have under the Dent Act you renounce or make no claim for?

"Mr. BRIGHT. We have none."

4. The contracts upon which the claim is based and the amount claimed under each are as follows:

Contracts.	Amortiza- tion.	10% profit.	Total.
P14172-2370Sa—.30 cal. tracer ctges.....	\$2,025.98	\$202.60	\$2,228.58
P6176-1461Sa—.30 cal. blank ctges.....	411.24	41.12	452.36
P14204-2375Sa—.30 cal. blank ctges.....	411.24	41.12	452.36
P7388-1564Sa—.45 colt pistols.....	471.39	47.14	518.53
14675—.30 cal. blank ctges.....	725.49	72.55	798.04
14067 and 14627—U. S. .30 cal. ctges.....	314,840.23	31,484.02	346,324.25
14064—U. S. model 1917 rifle.....	311,593.42	31,159.34	342,752.76
Total.....			693,528.88

5. In order to have a clear perception of the case and to determine the relative rights of the parties, in so far as the claim here made is affected, it is deemed expedient to analyze each contract and this will be done in the order stated.

(a) Contract P14172-2370Sa, dated August 22, 1918, is a formal contract for 50,000,000 tracer cartridges on a cost-plus basis, under which 1,167,300 cartridges had been delivered at the time of suspension by the Government December 12, 1918.

In Article XII of the contract it is provided:

“ * * * The contractor will also be compensated for the use of its property and working capital employed and depreciation thereof upon the basis of, and to the extent that such items enter into ‘normal costs’ enumerated in paragraph (d) of this contract.

* * * * *

“(d) The expenditures or costs entering into the ‘normal cost’ of the tracer cartridges are the following: * * *

“(6) A reasonable allowance, according to the conditions for depreciation of value of plant and property.”

Article XVI provides:

“For the determination of the actual cost as defined above, a ‘Compensation board’ composed of not more than six nor less than three officers of the Army shall be appointed by the contracting officer. This board shall ascertain, estimate, and determine the actual cost in accordance with Article XII hereof, and the decision of said board, or a majority thereof, shall be binding on both parties to this contract, subject to approval, modification, or disapproval by the Secretary of War, whose decision shall be final. * * *

The total amount paid claimant by the United States under this contract as of January 31, 1921, is \$315,062.78.

(b) Contract P6176-1461Sa, dated May 31, 1918, is a formal contract for 3,430,000, caliber .30, cartridges on a cost-plus basis completed in full by the contractor by delivery of the cartridges specified.

In this contract it is provided:

"The United States will make the following payments to the contractor:

"(1) The cost of the articles is allowed and determined in accordance with the 'Definition of Cost Pertaining to Contracts' issued by the Finance Division, Ordnance Department, under date of June 27, 1917, a copy of which is hereto attached and made a part hereof.
* * *

"(2) A sum equal to ten (10%) per cent of the cost of the articles as determined in accordance with subdivision (1) is hereby fixed as the contractor's profit. * * *

The total amount paid claimant by the United States under this contract as of January 31, 1921, is \$16,512.51.

(c) Contract P14204-2375Sa, dated August 27, 1918, is for 10,000.-000, caliber .30, cartridges on a cost-plus basis. This contract was prepared, but was never signed by either the Government or the claimant. There appears attached to the contract a certificate of approval by the Ordnance Department of date December 11, 1918. This informal agreement was suspended by the Government December 12, 1918, at which time 3,548,160 of the cartridges specified had been delivered. Any claim arising under this agreement being a Dent Act claim and counsel for claimant having expressly stipulated that no relief was sought under the act of March 2, 1919 (Dent Act), so much of the claim as is referable to this contract will not be further considered.

The total amount paid claimant by the United States under this informal agreement as of January 31, 1921, is \$23,226.32.

(d) Contract P7388-1564Sa, dated March 30, 1918, is a formal contract for the manufacture of 100,000 Colt automatic pistols, .45 caliber, model 1911, on a cost-plus basis. No deliveries of the completed articles were made and performance of this contract consisted entirely of preparation for production in the way of procurement of materials and tooling up until notice of suspension by the Government, December 12, 1918.

It is provided in Article XIII of the contract that:

"The contractor will also be compensated for the use of its property and working capital employed and depreciation thereof, upon the basis of and to the extent that such items enter into 'normal costs' enumerated in paragraph (d) of this article.
* * * * *

"(d) The expenditures or costs entering into 'normal cost' of the pistols are the following:
* * * * *

"(4) The sum of five thousand (\$5,000) dollars per month beginning March 30, 1918, for the use and occupation of the premises, property, and equipment devoted to the purpose of this contract and

at present leased or owned by the contractor. * * * This sum shall cover the cost of interest, insurance, taxes, general and special depreciation, and all special charges for improvements thereon."

Article XVII provides for a compensation board, in terms substantially the same as Article XVI of contract 2370Sa.

The total amount paid claimant by the United States under this contract as of January 31, 1921, is \$473,040.

(e) Contract 14675, dated September 15, 1917, is a formal contract for the manufacture of 4,640,000 caliber .30 blank cartridges, model 1919, on a cost-plus basis and was completed by the delivery to the Government of the cartridges specified.

It is provided in Article XI of the contract as follows:

"The contractor will be paid a profit of ten per cent of the material and labor cost of the cartridges delivered under this contract, which profit shall be paid and accepted in lieu of other compensation for the use of its property and working capital employed and depreciation thereof, as hereinafter stipulated.

"In ascertaining the material and labor cost of delivered cartridges for the purpose of determining the amounts to be paid as profits under this contract there shall be taken into account only the elements of cost below enumerated in paragraphs (1) and (2), viz:

* * * * *

"(2) A proper proportion of the running expenses of the contractor, including ordinary rentals, cost of repairs and maintenance, light, heat, power, insurance, management, salaries, and other indirect charges.

"The following elements of cost, below enumerated in paragraphs (3), (4), (5), and (6), for which the contractor will be entitled to reimbursement, are not to be considered in determining the amount of the contractor's profit under this contract, viz:

* * * * *

"(5) A reasonable allowance, according to the conditions, for depreciation of values of plant and property of the contractor."

The total amount paid claimant by the United States under this contract as of January 31, 1921, is \$28,912.18.

(f) Contract 14067, dated July 20, 1917, is a formally executed cost-plus contract for 245,000,000 caliber .30 ball cartridges, model 1906. The supplemental contract No. 14627 and other supplemental contracts increased the number of cartridges called for in the original contract to 953,640,000. Of this number there had been manufactured at the time of suspension of these contracts by the Government 442,000,000 cartridges.

It is provided in Article XI that:

"The contractor will also be compensated for the use of its property and working capital employed and depreciation thereof upon the basis of and to the extent that such items enter 'normal costs' enumerated in paragraph (d) of this article."

Paragraph (d) provides:

"The expenditures or costs entering into 'normal costs' per thousand cartridges are the following: * * *

"(5) A reasonable allowance according to the conditions or depreciation of values of plant and property of the contractor."

Article XV provides for a compensation board and that—

"The decisions of the said board, or a majority thereof, shall be binding on both parties to this contract, subject to the approval of the contracting officer."

The total amount paid claimant by the United States under this contract as of January 31, 1921, is \$16,482,638.07.

(g) Contract 14064, dated July 12, 1917, is a formally executed cost-plus contract for 225,000 rifles completed in full by the contractor by delivery of the rifles specified.

It is provided in Article XII that—

"For the purpose of this contract actual cost shall be generally as defined in the revenue bill approved September 8, 1916, section 302, in so far as the requirements of said revenue bill are applicable to and not inconsistent herewith. * * * The actual cost shall include the following and items similar thereto in principle, it being intended that the contractor shall be fully reimbursed for expenditures actually made in good faith in the performance of this contract: * * *."

"(f) A reasonable allowance, according to the conditions, for depreciation of values of plant and property." (Tr. 193.)

Article XVI provides for a compensation board to determine the cost in accordance with Article XII. The provisions of article 16 are similar to those of Article XVI of contract 2370Sa, except that the decision of the compensation board in contract No. 14064 is subject to the approval of the contracting officer, while in contract No. 2370Sa the action of the compensation board is subject to the "approval, modification, or disapproval" of the Secretary of War.

The total amount paid claimant by the United States under this contract as of January 31, 1921, is \$19,962,417.28.

6. Each of the above contracts contains the usual clause appearing in Government ordnance contracts providing for settlement of doubts or disputes by the Secretary of War as to the meaning or interpretation of anything appearing in the contract. None of the contracts have been finally closed and settled.

7. On December 24, 1918, the Chief of Ordnance designated the Claims Board as the compensation board provided for under the terms of "certain small-arms munitions contract" (Order No. 489). The Claims Board so designated was the Ordnance Claims Board, now the Ordnance Section. (Office Order No. 687.) If the decision

of the Ordnance Claims Board was not satisfactory to claimant, it had a right to appeal to the Chief of Ordnance. For the purpose of such an appeal the Appeal Section of the War Department Claims Board represents the Chief of Ordnance.

8. The gravamen of claimant's contention as presented by its counsel is that in determining the "cost" and "normal cost" as applicable to the above-enumerated contracts reference should be made to the pamphlet issued by the Office of Chief of Ordnance, "Definition of 'Cost' Pertaining to Contracts," dated June 27, 1917, and in which is incorporated excerpts from the revenue bill approved September 8, 1916. It is further contended by counsel that by a decision of the Treasury Department the plant of claimant, to the extent at least of its excess equipment, approximating \$10,000,000 over and above that required for its commercial business, has been held and determined to be a "special plant" and subject to amortization, and that this Treasury decision, together with Regulation No. 39, issued October 24, 1916, by Treasury Department interpreting depreciation as stated in the munition tax law of September 8, 1916, are binding and conclusive on the War Department. The following excerpts from the "Definition of 'Cost'" pamphlet are deemed pertinent:

"6. The term 'cost' as applied to this contract consists of four elements, which are concretely defined in the following:

"(1) The cost of all direct labor paid for by the contractor and used in the production of the articles contracted for herein.

"(2) The cost of all direct materials contained in or forming part of the articles contracted for herein.

"(3) Pro rata share of factory overhead expenses applicable to and necessary in connection with the manufacture of the articles contracted for herein.

"(4) Pro rata share of administrative and general expense applicable to and necessary in connection with the manufacture of the articles contracted for herein."

* * * * *

"DEPRECIATION.

"40. Depreciation shall be considered as an element of expense allowable on the property owned and used by the contractor in connection with the manufacture of the articles contracted for. For the purposes of determination of an equitable basis for depreciation on property the contracting officer will be influenced by definitions set forth in the revenue bill approved September 8, 1916, section 302, together with Treasury Decisions in respect thereto in so far as the requirements of said revenue bill and Treasury Decisions are applicable to and not inconsistent with the terms of the contract and special conditions thereto pertaining."

[Extract from revenue bill approved Sept. 8, 1916.]

TITLE III.—Section 302.

“(f) A reasonable allowance, according to the conditions peculiar to each concern, for amortization of the values of buildings and machinery, account being taken of the exceptional depreciation of special plants.

“41. Regulation No. 39, issued October 24, 1916, by the Treasury Department, No. 2384, interpreting depreciation as stated in the munition tax law of September 8, 1916, as follows:

“ART. XX. (A) The deduction authorized on account of depreciation relates to the loss due to use, wear, and tear of physical property owned and used by a manufacturer, but which is not especially designed or installed for the purpose of manufacturing munitions or parts thereof, and which, without material alteration and change, may be used in connection with any other business in which the person is or may be hereafter engaged.

“(B) The annual deduction on this account will be a reasonable allowance determined upon the basis of the cost and probable number of years constituting the life of the property.

* * * * *

“ART. XXI. (A) Section 302 of this title authorizes a deduction to meet the conditions peculiar to each concern, and has for its purpose the amortization of the values of buildings and machinery constituting special plants which will, except for salvage, have no substantial value to the manufacturer when the extracts executed or to be executed for the manufacture of munitions or parts thereof shall have been fully performed.

“(B) The deduction authorized on this account relates to property (buildings, machinery, and equipment) especially constructed or installed for use in the manufacture of munitions or parts thereof, and which, when no longer useful for this purpose, can not, without material alteration or change, if at all, be used for any other purpose, the life of which property is substantially coincident with the life of the contracts.

* * * * *

“(D) Neither the depreciation nor the amortization deduction allowable in the return made for the purpose of this title will relate to property used in connection with any other business carried on by the manufacturer. Amortization applies only and particularly to those special plants and equipment whose life and value, except salvage, will terminate with the end of the business for which they were erected and equipped. It is to be differentiated from depreciation, in that depreciation relates to property whose life and value is not dependent upon or materially affected by its use in the manufacture of munitions or parts thereof.

* * * * *

9. In presenting the claim counsel for claimant stated:

“We took our commercial business, which was almost nil during the period that these contracts were running, we took our fixed price contracts, and we took our total amortization, which, as pointed out

here, runs into very high figures, and allocated to the cost-plus contracts, upon which we were presenting this case, only that portion of the amortization which applies to the cost-plus contracts. That brings a total for the claim of \$693,000, in round numbers. Included in that there were original claims for accelerated depreciation to the amount of \$88,316.71. Those claims were presented to the Bridgeport board, and have been adjusted upon the basis of \$82,500. That account has been vouchered, or is ready for payment, and the amount involved is to be deducted from our claim as originally presented here."

In a letter from the claims representative, Bridgeport district ordnance office, to the vice chairman, War Department Claims Board, February 7, 1921, it is stated:

"2. The cost accounting section of this district have approved vouchers for accelerated depreciation for this same claim amounting to \$82,500. Before the finance division of this district will pay these vouchers they wish to be assured that these items have been deducted from the claim of the Winchester Co."

The following questions and answers are deemed pertinent:

"Maj. BLACKBURN. Is it your contention that this amortization which you are now seeking is for amortization of special plant facilities or special plant?"

"Mr. BRIGHT. The amortization covers both special plant—the provisions of the Treasury Department regulations under the law cover buildings, equipment, and machinery; everything that enters into the total plant. It is the amortization of the total plant.

"Maj. BLACKBURN. Then, your contention here now is before the War Department, if I understand you, that the plants of the claim—and were special plants and special plant facilities?"

"Mr. BRIGHT. They were special plants and special plant facilities as defined in this contract. * * * The United States knew that we had this plant absolutely in existence on the day the contract was entered into, ready to go to work the next day and make rifles, and the fact is, we were delivering rifles to the Government before we had this contract. We were so sure of the needs of the United States that we went ahead and manufactured rifles.

"Maj. BLACKBURN. The claim does not embrace, then, any other items of additional facilities installed for the purpose of completing these contracts?"

"Mr. BRIGHT. Not a dollar, sir, as Mr. Anderson, who is not only an engineer but also an accountant, will explain to you when he comes to explain the form of the contract."

10. Mr. R. E. Anderson, treasurer and expert accountant of claimant, in setting forth the method and basis of the claim, testified:

"The ordinary depreciation had of course entered into the cost of the contracts in the ordinary way, and by this process is entirely allowed for. That gives us the ultimate figure for the total amount of amortization. That figure was then prorated over all the Government contracts; not merely the cost-plus contracts but the contracts that were carried out on a fixed-price basis, on the theory that the excess

plant facilities that were used during the war were used for all of those purposes. * * * The total was then distributed over all of these contracts in the same manner as overhead has been generally distributed, on the basis of the direct labor charges, and from that gross the amount chargeable to each contract. Our claim then is entered on the basis of the amount prorated to the cost-plus contracts; the amount that we would prorate to the fixed-price contracts being assumed by the contractor."

* * *
 "Capt. SMITH. * * * I understand that your contention is that under the terms of your contracts, which were cost-plus contracts, you are entitled to be paid a certain amount for depreciation. If I am correct in that, I wish you would tell me why it was that when payments were made on these various contracts the item of depreciation was not taken into consideration and some accounting made for that?"

"Mr. ANDERSON. The item of depreciation was taken into consideration, and payments were made on account of it. That had to do with ordinary depreciation, but not special depreciation of special plants that were covered by the Treasury decision, which was rendered to us." * * *

About 85 per cent of the capacity of claimant's plant was engaged in Government work during the period covered by these contracts. The remaining 15 per cent was engaged in commercial business.

"Maj. BLACKBURN. Now, the extent of the plant and its facilities, as it was at the time of entering into these contracts, had been installed, had they not, in order to complete contracts for munitions for other countries engaged in the war?"

"Mr. ANDERSON. Yes, sir.

"Maj. BLACKBURN. Do I understand, Mr. Anderson, that any part of the claim, as now presented, embraces depreciation of plant or plant facilities?"

"Mr. ANDERSON. If I understand your question correctly, I should say it excludes depreciation. That is to say, depreciation of plant, as defined distinct from amortization, has been allowed for and deducted from this claim."

* * *
 "Mr. BRIGHT. * * * Now, normal, ordinary every-day depreciation, * * * wear and tear on the plant, has all been allowed for and paid for by the Government, and that factor has been used in arriving at this result; that is, the Government has been credited with that which they have allowed, and paid us for. We are here asking for the amortization of the plant, which the Treasury Department sometimes calls depreciation of special plants. It is all as set out in the law and regulations.

"Maj. BLACKBURN. You are asking for reimbursement for plant facilities which were installed and in operation at least at the time these contracts were entered into?"

"Mr. ANDERSON. Yes, sir.

"Mr. BRIGHT. Yes, sir; that is correct.

"Maj. BLACKBURN. May I ask you to state now succinctly upon what theory you make that contention? Just to the point?"

"Mr. ANDERSON. That it was in the minds of both parties to the contracts that those facilities existed, and that one of the considerations that led the contractors to consent to the cost-plus contract as distinct from the fixed-price contract, was that allowance for the amortization of the excess plant should be covered by the contract. I might state that in a nutshell that is our whole position.

* * * * *

"Maj. BLACKBURN. Mr. Anderson, let me ask you, in your use of the expression 'amortization,' as applicable to these contracts and this claim, do you have in mind or not, reimbursement for the expenditures made in the erection and construction of the plant and installation of the machinery?

"Mr. ANDERSON. In a certain sense; yes, sir. I have in mind, however, that, with this qualification: That as I see it amortization covers the recouping of the loss resulting from the abandonment temporarily or finally, as the case may be, of the excess plant which would be only a part of the expenditure.

"Maj. BLACKBURN. Wouldn't that be true if it were conceded that the plant had been erected for the Government, or, more properly, for the performance of these particular contracts? Wouldn't your statement there and your views be correct if that condition existed rather than taking a plant already constructed, machinery already installed, and undertaking to amortize it over subsequent contracts?

"Mr. ANDERSON. As I understand your question, sir, you were asking me what may have been the case had conditions been different than those that existed at the time the contract was entered into. The contract, as we understand it, contemplated amortization of the plant that existed at that time."

Mr. Anderson further testified that no portion of claimant's plant had been amortized over any of its contracts with foreign Governments.

"Maj. BLACKBURN. So that the plant and the facilities for which relief is here sought by way of amortization have never been amortized under any other contract either with this Government or with any foreign Government?

"Mr. ANDERSON. That is correct.

* * * * *

"Maj. BLACKBURN. As a matter of fact, Mr. Anderson, doesn't this idea rather occur in this instance, that the foreign Governments loaded up claimant with a very large excessive plant, and now the United States Government is asked to pay for that by these contracts as being amortized under these contracts?

"Mr. ANDERSON. Why, to a certain extent that is true. That is a matter for the contracting parties I should say, sir."

Mr. Anderson further testified that all the contracts which claimant had with foreign Governments were either completed, or completed on the basis of reduced quantities, "running out during the years 1916 and 1917." He mentioned the fact that claimant and one or two other similar concerns were led by foreign Governments

"somewhat blindly, into very large plant expansion." All the claimant's foreign Government contracts were on a fixed price basis, with the exception of the Enfield rifle contract with the British Government, which was made upon a fixed price basis, and when a controversy arose with that Government growing out of their desire to rid themselves of the contract by means that were not satisfactory to claimant, that contract was changed to a cost-plus basis:

"Mr. BRIGHT. What was the eventual result financially to the Winchester company of your foreign Government contracts? What situation did it leave you in?

"Mr. ANDERSON. It left us with a big plant, and that is about all. It brought about a cessation of dividends."

In the meantime these foreign Governments obtained their own sources of supply and were canceling or otherwise attempting to release themselves from their contracts with claimant.

DECISION.

1. Contracts are to be so interpreted as to give effect to the intention of the parties. This intention may be gathered from the existing facts and circumstances under which the contract was entered into, taken in connection with the language of the written instrument itself. As stated by the Supreme Court of the United States:

"In cases like this it is the duty of the court to assume the standpoint occupied by the parties when the contract was made * * * to let in the light of the surrounding circumstances—to see as the parties saw, and to think as they must have thought, in assenting to the stipulations by which they are bound." (*Scott v. U. S.*, 79 U. S. 439, s. c. 20 L. Ed. 438.)

Bearing these principles in mind, we are at once impressed with the outstanding fact in this case that the United States was in no wise responsible for either the original construction of the plant of the Winchester Repeating Arms Co., or for the expansion and increased facilities thereof. It must be remembered that the plant expansion and the increased facilities, the cost of which claimant is here seeking to have amortized over its contracts with the United States, were installed for the performance of claimant's contracts with the British and Russian Governments. They were not installed even in contemplation of securing contracts with the United States.

2. The next important fact which presents itself to our minds is that the performance by claimant of its war contracts with the British and Russian Governments, for the performance of which this great excess capacity of its plant had been installed, had not resulted in satisfactory financial gain to claimant. In fact, as Mr. Anderson, claimant's treasurer, stated the proposition, the final outcome of claimant's contractual relations with the foreign Governments was

that claimant was left "with a big plant," and that a "cessation of dividends" had resulted. The contracts were being terminated during the years of 1916 and 1917, either by completion or by cancellation, due to the fact that the Allies had reached the point where they were able to furnish their own sources of supply of war munitions. About this time the United States entered the war, and, of course, the thing of utmost and prime importance to the War Department was the proper equipping of the Army with firearms and munitions. These were to be the best the country could afford and in the shortest possible time. Such was the situation when the Government turned to the claimant, the Winchester Repeating Arms Co., and it would seem that the circumstances were looked upon as affording a favorable opportunity of making the United States the burden-bearer of conditions which it did not bring about or encourage. Upon it was to be unloaded the amortization of the excess plant expansion, the installation of which claimant had been led into "somewhat blindly" by foreign Governments. While it may be conceded that such was the intention of claimant, as admitted on the witness stand by its treasurer, Mr. Anderson, we are utterly unable to bring our minds to the point of believing that the Government's contracting officers ever entertained such intention or contemplated such an idea. We feel that we are fortified in this conclusion from an expression appearing in claimant's rifle contract, No. 14064, the first of the contracts entered into with the Government July 12, 1917, here involved, as follows:

"The actual cost shall include the following and items similar thereto in principle, *it being intended that the contractor shall be fully reimbursed for expenditures actually made in good faith in the performance of this contract.*" (*Italics ours.*)

"(f) A reasonable allowance, according to the conditions for depreciation of values of plant and property."

We think that a fair interpretation of the language here used is that the "expenditures" made by the contractor for which it was to be "reimbursed" has reference to such expenditures as were necessary to install in order to complete performance according to the terms of the contract, and does not refer to expenditures already made and facilities already installed at the time of entering into the contract. It is clear from statements of counsel for claimant, as well as from the testimony of Mr. Anderson, that what claimant is here seeking to recover is plant amortization, it being contended that the excess capacity of claimant's plant which was installed to meet the requirements of its foreign Government contracts constituted a "special plant" subject to amortization, and it is urged that the decision of the Treasury Department so holding is "conclusive and binding" on the War Department. We are not fully informed as to all the facts upon

which such alleged decision of the Treasury was based, but at most, as provided in the "Definition of Cost" pamphlet of June 27, 1917, the contracting officer was only to be "influenced" by the Treasury decisions in determining an equitable basis "for depreciation." We do not understand this expression to be conclusive on the War Department, and we are far from being convinced that under the facts as presented by the record before us the plant of claimant, for which amortization is here sought, can in any sense be held to be a "special plant." Furthermore, there appears no stipulation in the cost pamphlet referred to that the decisions of the Treasury Department shall be applicable in any respect in determining the question of amortization. In considering this claim the distinction between "amortization" and "depreciation" must be borne steadily in mind. Amortization means extinction of debt, usually by a sinking fund, while depreciation is to be considered as an element of expense allowable on the property owned and used by the contractor in connection with the manufacture of the articles contracted for.

3. The United States, unless the contract expressly provides to the contrary, assumes that the contractor has a plant, office organization, and capital adequate for the performance of the contract, and, nothing appearing to the contrary, a fair inference is that the contractor, by his act of entering into the contract, represents to the United States that he has a plant, equipment, facilities, and capital sufficient to complete performance in accordance with the terms of the contract. In the instant case the United States was fully informed as to the already existing plant facilities of claimant and knew that no necessity existed for the installation of increased facilities, and there appears to have been no rhyme or reason for the United States to assume the extinguishment of the debt incurred in the expansion of the plant capacity of claimant which was brought about by reason of its contractual relations with the British and Russian Governments. This view is in harmony with subsection F of Supply Circular No. 111, November 9, 1918, Purchase, Storage and Traffic Division, and with the rules for cost accounting in the War Department as set forth in Supply Circular No. 126, December 7, 1918, Purchase, Storage and Traffic Division, as the same have been interpreted by this Board. Supply Circular No. 111 applies to formal and informal contracts alike and subsection F provides:

"Where special facilities were properly provided in connection with the performance of the original contract, necessity for which was contemplated by the contractor and included in his estimate of cost at the time the original contract was made, such portion of the cost thereof as would reasonably have been recouped had the uncompleted portion of the original contract been performed. The amount so allowed shall not exceed a sum which shall be computed as follows:

"From the cost of such special facilities deduct their fair value at the date hereof and state such portion of the remainder as is represented by the ratio of the uncompleted portion to the whole of the original contract."

The rules for cost accounting in the War Department as set out in Supply Circular No. 126 include depreciation, and depreciation is divided into two classes, viz:

"(a) Ordinary depreciation of the physical plant, and (b) commercial depreciation or depreciation in demand for plants of that character (sometimes referred to as 'Amortization')."

"A. *Ordinary depreciation*.—1. Depreciation is to be considered an element of cost, and shall be based on the cost of property owned and used by the contractor in connection with the performance of Government contracts. * * *

"B. *Commercial depreciation*.—Commercial depreciation of manufacturing facilities provided by the contractor especially to meet the requirements of this contract shall be allowed as an element of cost.

"Commercial depreciation covers losses in value due to commercial conditions not provided for in ordinary depreciation as defined in the preceding section. The important factors of commercial depreciation are—

"(a) Decline in commercial value of facilities upon determination of the contract due to decreased demand for the products which they are capable of manufacturing; and

"(b) Abnormal cost of increased facilities due to war conditions.

"Allowances for commercial depreciation shall be determined by the contracting officer, and shall represent the difference between the original cost of such increased facilities, including cost of installation, and their fair commercial value to the contractor at the termination of the contract, less ordinary depreciation already deducted."

It will be noted that "Commercial depreciation," which is really the amortization claimant is seeking here to recover, may only be allowed in cases in which the contractor provided the facilities "*especially to meet the requirements of this contract*." (*Italics ours.*) Just here it is important to bear in mind that the uncontradicted testimony in this case, as appears from the findings of fact, is that ordinary depreciation, wear and tear on the plant, have all been allowed for and paid for by the Government. In addition to paying claimant for ordinary depreciation, the Bridgeport district ordnance office has approved vouchers in favor of claimant for "Accelerated depreciation" in the sum of \$82,500, which amount counsel for claimant asks to be deducted from the claim as presented. We are of the opinion that claimant is not entitled to any further amount for depreciation of any kind or class.

4. In concluding this decision we know of no language more appropriately expressing our views denying claimant all relief than that of the United States Supreme Court in *Smoot v. United States*

(82 U. S. 36, 21 L. Ed., 107), in which Mr. Justice Miller, speaking for the court, said:

“There is in a large class of cases coming before us from the Court of Claims a constant and ever-recurring attempt to apply to contracts made by the Government, and to give to its action under such contracts, a construction and an effect quite different from those which courts of justice are accustomed to apply to contracts between individuals. There arises in the mind of parties and counsel interested for the individual, against the United States, a sense of the power and resources of this great Government, prompting appeals to its magnanimity and generosity to abstract ideas of equity covering even the closest legal argument. These are addressed in vain to the court.”

It follows that the action of the Ordnance Section in disallowing the claim should be and hereby is in all things affirmed.

DISPOSITION.

The usual order denying relief will be entered.

Lieut. Col. McKeeby and Lieut. Tabb concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

MARCH 1, 1921.

Case No. 3011.

***In re* CLAIM OF NEW ENGLAND WESTINGHOUSE CO.**

1. **INFORMAL AGREEMENT.**—Where a procurement order was issued prior to November 11, 1918, for increased facilities and further negotiations were had after November 1, 1918, the agreement entered into prior to the armistice is the basis for an adjustment of the claim under the act of March 2, 1919.
2. **SAME—JURISDICTION.**—The Secretary of War is without authority under the act of March 2, 1919, to adjust an informal agreement entered into after November 11, 1918.
3. **CLAIM AND DECISION.**—Claim for \$134,994 under the act of March 2, 1919, for facilities to be used in manufacturing gunstocks. Held, claimant is entitled to recover for increased facilities secured in accordance with the procurement order.

Capt. Miller writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim, amounting to \$134,994, for equipment used in the manufacture of gunstocks, has been filed under the provisions of Supply Circular No. 17, Purchase, Storage and Traffic Division, General Staff, 1919, as a claim arising under the act of March 2, 1919, and comes to the Appeal Section on appeal from a decision of the Ordnance Section.

2. On June 1, 1918, Lieut. Col. Charles N. Black, of the Ordnance Department, addressed a letter to the New England Westinghouse Co., in which he stated that the Government would probably require the facilities of this company for the manufacture of rifle stocks, 1917 model. On August 12, 1918, Lieut. Col. Black sent the following letter to claimant:

“1. By direction of the Chief of Ordnance, this letter is to serve as a preliminary notice that a contract is being drawn with your concern for the purchase of the necessary machine tools and the manufacture and changing of jigs and fixtures for the production of four thousand model of 1917 gun stocks per day.

“2. The estimated cost of changing the present jigs and fixtures and the manufacture of additional ones required is \$150,000. The estimated cost of the machinery it will be necessary to take over is \$250,000.

"3. This machinery, it is understood, is owned by the Russian Government, under control of the British Government. It is to be taken over for the United States by the New England Westinghouse Company.

"4. The value of this machinery will be determined by an appraisal, each of the interested parties naming an appraiser; and, in case these can not agree, a third will be named.

"5. The appraisal value should be based on the estimated cost to produce it new at prices prevailing January 2, 1918, less such depreciation as may exist in the equipment.

"6. The title of the tools manufactured and machinery taken over will be in the name of the United States Government.

"7. The terms upon which the actual manufacture of gun stocks is to be made will be covered in a separate contract and will be subject to future negotiations."

3. On August 27, 1918, the following procurement order, covering machinery and equipment, was issued in favor of claimant:

[Procurement order War-Ord. P14205-2376 Sa, including 1st amendment to negotiations. August 27, 1918.]

SUMMARY.

Firm: New England Westinghouse Company, Springfield, Massachusetts.

Order for: Machinery and equipment necessary for the production of 4,000 model 1917 gun stocks per day, estimated, \$400,000.

GENTLEMEN: 1. The United States of America, acting through the undersigned, under the direction of the Chief of Ordnance, hereby authorizes and requests you to install in your plant at Springfield, Massachusetts, the necessary machinery and equipment (hereinafter referred to as increased facilities) for the production of four thousand (4,000) model of 1917 gun stocks per day.

2. The Production Division of the Ordnance Office will have entire supervision of the work involved in the procuring and installing of increased facilities herein authorized.

3. The Production Division of the Ordnance Office will conduct the inspection of the increased facilities herein authorized.

4. The increased facilities herein authorized shall be installed as soon as possible and shall be designed for the production of gunstocks, model of 1917, at the rate of 4,000 per day. The total number of gunstocks to be furnished by the contractor, to be specified in a separate contract, will be prepared and executed between the parties hereto.

5. (a) You will be paid the actual cost of the increased facilities hereby authorized, determined in accordance with "Definition of 'Cost' Pertaining to Contracts," issued by the Office of the Chief of Ordnance, War Department, June 27, 1917, plus a profit of ten per cent (10%) on all tools manufactured and work done by you at your plant, Springfield, Massachusetts, against this order, and five per cent (5%) on all tools manufactured by outside concerns to apply against this order. No profit will be paid on machine tools

or any other standard articles purchased to apply against this order.

(b) The total amount to be paid you for the increased facilities herein authorized (including cost and percentage of profit to be paid to you as set forth above) shall not exceed four hundred thousand dollars (\$400,000) unless authorized by the Chief of Ordnance or his duly authorized representative.

(c) The increased facilities herein authorized shall be and remain the property of the United States until sold to you or otherwise disposed of, and shall, so far as practicable, be kept separate and apart from your property. The United States shall have a period of one (1) year after the termination of the war, as evidenced by proclamation of the President, within which to remove these facilities. They shall be marked in such a manner as to give notice to the public that such increased facilities are the property of the United States. You shall not acquire any right, title, or interest of any kind or nature in the increased facilities, and they shall at all times be considered as personal property and shall not be deemed to be affixed to, or in any way a part of the real estate upon which they are situated.

Itemization of cost, showing the approximate value of additional facilities, listed herewith:

Woodworking machines, including those on hand and those necessary to purchase-----	\$137,493.00
Cost of freight and installation-----	7,500.00
Changes in machine tools, new jigs, and fixtures; initial installation of cutters and gauges; also rearranging of equipment-----	150,000.00
Dust-collecting system-----	35,000.00
Motors, wiring, and power transmission-----	34,684.50
Trucks, benches, vises, etc-----	5,322.50
Dry-kiln apparatus (not including building)-----	30,000.00
Grand total-----	400,000.00

(e) You agree to protect and save harmless the United States from any and all claims that may be made by or on behalf of any mortgagee, trustee, bond holder, or lienor against any building, structure, machinery, equipment, or other property that may, under the provisions hereof, be placed upon land subject to a mortgage, lien, or deed of trust. * * *

Any shipping instructions necessary will be furnished you by the Production Division of the Ordnance Office.

7. It is understood that a formal contract, to be prepared by the United States, will be entered into between you and the United States covering the subject matter of this order as soon as the same can be prepared and presented for execution. A brief outline of the terms and conditions of said contract is set forth herein.

8. Communications on this subject should refer to P14205-2376 Sa; PS. Your acceptance of this order should be acknowledged by wire and confirmed by signing, dating, and returning the enclosed copy as indicated thereon.

UNITED STATES OF AMERICA,
By WILLIAM WILLIAMS,
Lt. Col., Ord. Dept., U. S. A.

4. Under date of November 11, 1918, claimant executed a written acceptance of the above procurement order.

5. The regular form of contract confirming the procurement order was not prepared until early in the year 1919. On February 24, 1919, claimant returned the contract unsigned, requesting certain changes, the most important of which involved the insertion of the following clause:

"It is understood that the greater part of the machinery and equipment is already on hand, due to cancellation of a contract which the contractor previously had with the British Government, and it is agreed that such of this machinery and equipment as is necessary in the manufacture of gunstocks, model of 1917, and as included in the following schedule, is to be purchased by the United States Government under this contract and released to the contractor's use. Additional machinery and equipment as required and as included in the said schedule is to be purchased by the contractor and paid for by the Government."

6. The contract, however, was not signed by either the Government or the claimant.

7. Claimant had previously secured a contract from the Russian Government for the manufacture and delivery of 1,800,000 rifles. On or about May 1, 1917, the British Government assumed the obligations of the Imperial Russian Government under the contracts for rifles, and entered into a supplemental contract with claimant for the production of a reduced number, 1,000,000 rifles. These contracts were later terminated and claimant transferred all of its assets to the liquidating trustees. On December 28, 1917, claimant submitted a proposition to the Chief of Ordnance for the production of Russian rifles and Browning machine guns, which proposition was accepted by the Chief of Ordnance on the same day. The agreement arising therefrom was the basis of claim 150-C-406 of the New England Westinghouse Co., decided by the Board of Contract Adjustment on October 21, 1919. That agreement provided that the United States would purchase certain facilities and would pay a stipulated rent for the buildings and building equipment. The Board of Contract Adjustment held that the agreement contemplated that the United States would purchase only those facilities owned by the British Government and would not pay for buildings and equipment released by the British Government to claimant. This determination was based on a provision contained in an agreement entered into between claimant and the liquidating trustees on December 29, 1917, which reads as follows:

"That all real estate of the N. E. Westinghouse Company, that the buildings thereon, and all office furniture and office equipment of the N. E. Westinghouse Company shall be and remain the sole and absolute property of the N. E. Westinghouse Company, without claim thereagainst by his Britannic Majesty's Government.

"The word 'buildings' as herein used shall include all fixtures and building equipment of a manufacturing plant, including, among other things, all light, heat, power, and transmission systems and apparatus, transformers, switches, wiring, motors not attached to individual machines, line shafting, hangers, belting, elevators, ventilating apparatus, and fans."

8. When the claim was first considered by the Ordnance Claims Board (predecessor of the Ordnance Section, War Department Claims Board), it was decided that the form of contract prepared in the early part of 1919 was the real agreement. It was later determined, however, by the Ordnance Claims Board that such an agreement could not be approved in the face of the decision of the Board of Contract Adjustment concerning machine-gun facilities. That Board thereupon appointed Mr. W. F. Walsh, of the Bridgeport salvage board, as approval officer under the agreement to approve and appraise the items of increased facilities.

9. Mr. Walsh approved certain items of machinery and equipment amounting to \$150,179.41, but disapproved the following items, which, in his opinion, should be classified as "building equipment" as this term is defined in the agreement executed between the claimant and the liquidating trustees on December 29, 1917:

Power transmission.....	\$10, 534. 00
Dry-kiln equipment.....	85, 000. 00
Ventilating system.....	20, 000. 00
Electric motors.....	16, 570. 00
Electric wiring.....	2, 890. 00
Total	134, 994. 00

10. Claimant now comes to the Appeal Section, urging payment of the items disapproved in the report of Mr. Walsh.

11. An effort has been made to secure light on the present controversy from Lieut. Col. Black, who has stated that his recollection of the transaction is vague, and refers the Board to the contemporaneous letters as the best evidence of this agreement. Lieut. H. B. Johnson, who was Lieut. Col. Black's assistant, has written the Board in part as follows:

"It was understood by the writer that the machinery and equipment to be used was at the time the property of the Russian Government, or more properly in the hands of the Russian rifle trustees. It was, therefore, necessary for the New England Westing House Company to take over any machinery and equipment necessary from these trustees in the name of the United States Government."

DECISION.

1. The procurement order of August 27, 1918, as explained by Lieut. Col. Black's letter of August 12, 1918, constitutes the agreement under which this claim must be adjusted. Only those negotia-

tions had prior to the armistice are involved in the agreement. The efforts to change the terms of the agreement in February, 1919, are of no avail, as the Secretary of War and this Board, acting as his agent in such cases, has no jurisdiction under the act of March 2, 1919, of informal agreements entered into after November 11, 1918.

2. In negotiating with claimant concerning the facilities to be acquired by the Government, both Lieut. Col. Black and Lieut. Johnson without doubt intended that the United States Government should acquire only that equipment owned by the Russian Government. This is shown by the statement of Lieut. Col. Black in his letter of August 12, 1918, that "this machinery, it is understood, is owned by the Russian Government under control of the British Government." Lieut. Johnson's statement is to the same effect. The Government did not intend to enter into an agreement with claimant which would provide that the Government should acquire facilities already owned by the claimant. The only object in purchasing these special facilities was to acquire same from the Russian Government through the British trustees in order that the facilities might be used in manufacturing gun stocks for the United States Government. It was understood by the Government at that time that the New England Westinghouse Co. could not use these facilities unless they were purchased by the United States Government. Later developments have revealed the fact that before the negotiations were under way between Lieut. Col. Black and the New England Westinghouse Co., the New England Westinghouse Co. had secured the ownership of certain facilities through its agreement of December 29, 1917, comprising all real estate, buildings, office furniture, and office equipment, the word "buildings," including all fixtures of building equipment of a manufacturing plant; among other things, all light, heat, power, and transmission systems and apparatus, transformers, switches, wiring, motors not attached to individual machines, line shafting, hangers, belting, elevators, ventilating apparatus, and fans. It appears therefore that Lieut. Col. Black and Lieut. Johnson were negotiating with the New England Westinghouse Co. in June and August, 1918, for the purchase of equipment from the Russian Government through the British trustees, in order that same might be used by the New England Westinghouse Co., when, as a matter of fact, certain of this equipment had already been acquired by the New England Westinghouse Co. several months before the period covered by these negotiations.

3. It is clear that it was not contemplated by the Government, prior to November 11, 1918, that it should purchase any facilities owned by the claimant.

4. Claimant can not, therefore, be allowed the items of power transmission, dust collecting or ventilating system, and electric

wiring. Likewise the item covering electric motors can not be allowed as to such motors as were not attached to individual machines.

5. Much of the claim for dry-kiln equipment should be allowed. This item covers complete equipment for a 24-compartment dry kiln, exclusive of the building itself, and consists of recording thermometers, pressure controllers, thermostat mixing valves, gauges, piping, regulators, valves, fans, pumps, tanks, compressors, and miscellaneous fittings. Many of these articles would not come under the head of building equipment. In acquiring the ownership of the buildings and building equipment from the British trustees, the New England Westinghouse Co. was securing for its ownership those parts of a manufacturing plant which would be valuable in its commercial business in peace. The ownership of the facilities which would be used exclusively in the manufacture of gunstocks was not desired and was not acquired by claimant. It is plain, therefore, that since much of the equipment in the dry-kiln building could be used only in manufacturing gunstocks, the Government should pay for such equipment. The Government should accept ownership of all of the dry-kiln equipment except such articles as would be used in the building if it were applied to commercial purposes. Those articles of equipment used exclusively in a dry kiln should be paid for by the Government. The power transmission, dust-collecting system, electric motors, and electric wiring are held to have been retained by claimant because this equipment would have been kept in the buildings if the plant had been turned to the production of peace-time articles. It becomes necessary to apply the dry-kiln equipment in the same manner, but, since most of this dry-kiln equipment could not be used in a plant manufacturing a different product, the Government should accept ownership of a great part of such equipment.

DISPOSITION.

The Appeal Section, War Department Claims Board, will make and transmit to the Ordnance Section, War Department Claims Board, a statement of the nature, terms and conditions of the agreement and certificate C for action in the manner provided in subdivision C, section 5, supply circular No. 17, Purchase, Storage, and Traffic Division, General Staff, 1919.

Lieut. Col. McKeeby and Capt. Frazer concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

MARCH 2, 1921.

Case No. 2248.

In re CLAIM OF THE ANNISTON STEEL CO.

This case was decided by the Board of Contract Adjustment on February 19, 1920, relief being denied. Claimant appealed to the Secretary of War, who remanded the case to the Appeal Section, War Department Claims Board, for further proceedings. On December 27, 1920, the Appeal Section issued its decision on reconsideration, granting partial relief, on which claimant also appealed to the Secretary of War. This decision was affirmed by the Secretary of War March 2, 1921. (See Vol. III, p. 862, and Vol. VIII, p. 59, and p. 368.)

ON REHEARING BEFORE THE SECRETARY OF WAR.

Upon consideration of the further appeal and the record, I am convinced that the action of the Appeal Section is correct, and the same is hereby affirmed.

NEWTON D. BAKER,
Secretary of War.

July 2, 1920.

Claim No. 2047 and Related Cases.

In re CLAIM OF EASTERN MALLEABLE IRON CO.

ON APPEAL BEFORE THE SECRETARY OF WAR.

Upon appeal to Secretary of War, the decision of the Board of Contract Adjustment, dated January 27, 1920, was affirmed in accordance with the recommendation of special advisers. (See Vol. III, p. 691.)

This claim comes to me on appeal from a decision of the Board of Contract Adjustment, denying claimant relief.

Upon consideration of the entire record, the decision of the Board is hereby affirmed in accordance with the recommendation of the majority of the special advisers, whose memoranda are hereto attached.

This order will operate as an affirmance of the decisions of the Board of Contract Adjustment in regard to the claims mentioned in the attached list, which the Board has found to be controlled by the decision rendered in the matter of the claim of the Eastern Malleable Iron Co.

NEWTON D. BAKER,
Secretary of War.

List of cases controlled by a decision in the Eastern Malleable Iron Co. Case No. 150-C-2047 according to the findings of the Board of Contract Adjustment.

Claimant.	Address.	Case No.
Bridgeport Chain Co.....	Bridgeport, Conn.....	150-C-2048
Feeney Tool Co.....	751 Central Avenue, Bridgeport, Conn.	150-C-2049
Black Rock Manufacturing Co.....	Bridgeport, Conn.....	150-C-2036
Feeney Tool Co.....	do.....	150-C-2031
Bryant Electric Co.....	do.....	150-C-1465
Do.....	do.....	150-C-1204
Harris Engineering Co.....	do.....	150-C-2055
Automatic Machine Co.....	do.....	150-C-1680
Locomobile Co. of America.....	do.....	150-C-2006
Bridgeport Die & Machine Co.....	do.....	150-C-1995
Bryant Electric Co.....	do.....	150-C-2178
Carpenter Manufacturing Co.....	do.....	150-C-1996
American Tube & Stamp. Co.....	515 Union Avenue, Bridgeport, Conn..	150-C-2044
Bridgeport Hardware Manufacturing Co.....	Iranistan Avenue, Bridgeport, Conn..	150-C-2172
Do.....	do.....	150-C-2408
A. H. Nilson Machine Co.....	1525 Railroad Avenue, Bridgeport, Conn.	150-C-2060
Harris Engineering Co.....	Bridgeport, Conn.....	150-C-2045
Do.....	do.....	150-C-2043
Bilton Machine Tool Co.....	do.....	150-C-2084
Do.....	do.....	150-C-1748
A. H. Nilson Machine Co.....	do.....	150-C-1681

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Claimant.	Address.	Case No.
Black Rock Manufacturing Co.	Bridgeport, Conn.	150-C-2052
Electric Cable Co.	do	150-C-2229
Holmes & Edwards Silver Co.	do	150-C- 573
Bilton Machine Tool Co.	do	150-C-2035
Bridgeport Chain Co.	do	150-C-2068
Raybestos Company	do	150-C-2063
Do.	do	150-C-2064
Bryant Electric Co.	do	150-C-2045
Bridgeport Brass Co.	do	150-C-1256
American Tube & Stamping Co.	do	150-C-1977
Bridgeport Chain Co.	do	150-C-2023
Bryant Electric Co.	do	150-C-1549
Bridgeport Brass Co.	do	150-C- 564
Connecticut Electric Manufacturing Co.	do	150-C-1999
Bridgeport Deoxidized Bronze & Metal Co.	do	150-C-1994
Bryant Electric Co.	do	150-C-1998
Automatic Machine Co.	do	150-C-1972
Bryant Electric Co.	do	150-C-2030
Bilton Machine Tool Co.	do	150-C-1974
Bradley Machine Co.	do	150-C-1972
Bryant Electric Co.	do	150-C-2410
Breul, Fred G.	282 Kossuth St., Bridgeport, Conn.	150-G-1971
Eastern Malleable Iron Co. and Bridgeport Malleable Iron Co.	Bridgeport, Conn.	150-C-2217
Bilton Machine Tool Co.	do	150-C-1547
Bryant Electric Co.	do	150-C-1466
Precision Gauge & Tool Co.	do	150-C-2084
Bridgeport Brass Co.	do	150-C-1257
Bryant Electric Co.	do	150-C-2409
Sprague Meter Co.	do	150-C-2006
Eastern Malleable Iron Co. and Bridgeport Malleable Iron Co.	do	150-C-2206
Lindstrom Die Tool & Gauge Works	do	105-C-2004
Bilton Machine Tool Co.	do	150-C-1965
Do.	do	150-C-2041
Bryant Electric Co.	do	150-C-2032
Bridgeport Cutter Works	do	150-C-2037
Eastern Malleable Iron Co.	do	150-C-1500
Connecticut Electric Manufacturing Co.	do	150-C-1521
Anderson Die Machine Co.	do	150-C-1978
Eastern Malleable Iron Co. and Bridgeport Malleable Iron Co.	do	150-C-2056
Coulter & McKenzie Machine Co.	do	150-C-1990
Bryant Electric Co.	do	150-C-1650
Bridgeport Chain Co.	do	150-C-1637
Do.	do	150-C-2085
Electric Compositor Co.	do	150-C-2086
Bridgeport Metal Goods Manufacturing Co.	do	150-C-2072
Holmes & Edwards Silver Co.	do	150-C- 637
Harris Engineering Co.	do	150-C-2051
H. E. Harris Engineering Co.	do	150-C-1495
Modern Manufacturing Co.	do	150-C-2002
International Silver Co.	do	150-C-2003
Raybestos Co.	do	150-C-2063
Bridgeport Hardware Manufacturing Co.	do	150-C-1776
Bryant Electric Co.	do	150-C-1997
Bridgeport Hardware Manufacturing Corporation	do	150-C-1992

JUNE 25, 1920.

MEMORANDUM FOR THE SECRETARY OF WAR.

In a group of claims asserted by Bridgeport manufacturers appeal has been taken to the Secretary of War from the decision of the Board of Contract Adjustment refusing to find that an agreement was entered into between the Secretary of War and the manufacturers in question to reimburse the claimants for sums spent by them in the carrying out of contracts with or for the benefit of the War Department through paying an increase in wages pursuant to an order made by the National War Labor Board in the summer of 1918.

As a means of ending existing labor difficulties in the Bridgeport district and averting what appeared to be very serious threatened difficulties the Secretary of War requested the National War Labor Board to undertake an investigation and make an award dealing with the wage question as affecting the war industries of the Bridgeport district, and requested or insisted that employers and employees in the Bridgeport district should agree to abide by the award to be made by the National War Labor Board.

The employers raised the question that they should be reimbursed for such increased expenditures for wages as might result from the award and proposed to make that a condition of the submission to arbitration.

The Secretary of War, through his representative, insisted that the submission to arbitration must be unconditional. The manufacturers represented, except the Locomobile Co., stated that they would make the submission without conditions, but would confidently expect reimbursement, to which the representative of the Secretary of War said nothing. The manufacturers proceeded to sign submissions to arbitration which contained no condition. The Locomobile Co. stated that its submission was conditioned on such reimbursement, but with the others proceeded to sign a submission which expressed no condition. There seems to have been a prevailing expectation among the manufacturers and certain of the Government officers concerned in the matter that the manufacturers would receive reimbursement. The Secretary of War pointed out to the National War Labor Board that they were the agents of the Secretary of War to determine whether the increase in wages occasioned by the award to manufacturers operating under contracts with the customary labor dispute clauses should receive reimbursement for the increase in wages. The War Labor Board adopted a resolution recommending that the Secretary of War should make such reimbursement on account of the increase in wages as after investigation he should deem proper. It is not entirely clear from the record, but it seems quite possible that the War Labor Board at the time regarded this resolution as applying to all contractors affected by the award and not merely to those whose contracts contained labor-dispute clauses. The contracts here involved did not contain labor clauses.

Consideration was given to making supplemental contracts to deal with the matter, but this plan was not followed. After the passage of the Dent Act claims were presented as outlined above.

In view of the attitude of the representative of the Secretary of War, prior to the signing of the unconditional submissions, insisting that submission must not be conditioned on reimbursement for increased labor costs, it seems to us that no agreement, express or implied, in fact was made by the Secretary of War to reimburse the

manufacturers submitting to the arbitration for any increase in wages that might result from that arbitration. The statement of the manufacturers, who proceeded to make unconditional submission, that they confidently expected reimbursement, had no other effect than to constitute an assertion as to the action which they thought the Government ought in fairness to take and which they would continue to ask, and which they believed the Government would take, not as a matter of agreement but as a matter of fair dealing.

This, as we have said, does not in our view constitute either an express agreement or an agreement implied in fact to pay to the claimants any increase in wages due to an award, nor can we find growing out of the circumstances any obligation imposed by law to pay such increase.

The duress complained of is that unless the claimants had submitted unconditionally to arbitration by the War Labor Board their plants would have been liable to seizure by the Government. But even in such case just compensation would have been made. Under the law all plants engaged in the manufacture of war materials during the war were subject to be commandeered.

We can see no duress in this case, nor can we find any such service rendered to the Government as would impose upon the Government the obligation of paying the increase in wages, irrespective of any agreement expressed or implied in fact to do so.

In reaching this result we appreciate that it is one with which neither the Government nor the claimants can feel satisfied. There was a feeling among the claimants and among certain Government officials that a reimbursement for wage increase due to the award would be made. It was unsound and unfortunate administration that such a feeling should have been allowed to exist in the absence of any agreement or legal basis for making such payments, but in view of the very clear statement of the direct representative of the Secretary of the matter, immediately preceding the action of the manufacturers, such general atmosphere can not be made the substitute for an agreement.

While it is unfortunate from the standpoint of the Government that anyone dealing with it should feel that the Government is not doing those things which it was hoped and believed it would do as a matter of fair dealing, we are by no means clear that in this case an agreement by the Department to pay to the claimants any increase in wages that might result from the award would have been a proper course for the Department to have pursued. At the time the question of submission to arbitration arose, the claimants were proceeding under fixed price contracts. Under those contracts they assumed the risk of rising labor costs. Continuity of production was to their advantage, and it was their duty under their contracts to use their

best efforts to insure it. For all that this record shows it may be that the contractors in their estimates took into account a greater prospective increase of wages than actually resulted from the award of the National War Labor Board, and for all that appears in this record a greater cost through curtailed production or increased wages resulting from labor disturbances might have had to be borne by the contractors had they not submitted to the award.

Such a situation as is here shown, while it might under circumstances of individual hardship give rise to an equity which would be a proper subject for the consideration of Congress with a view to granting special relief, does not, therefore, from any point of view, justify favorable action by you under the act of March 2, 1919. Furthermore, we do not find from the record that the United States caused any increase in wages beyond the level resulting from increased costs of living and from the increased demand and decreased labor supply incident to the war, nor do we think that it can properly be found from the evidence in this case the labor costs of the claimant were increased beyond what they would have been had the Government refrained from any participation in the controversy.

It is accordingly recommended that the decision of the Board of Contract Adjustment be affirmed.

GRANT M. J. PEELLE,
R. C. GOODALE,
G. A. DOOR,

Special Advisers to the Secretary of War.

SUPPLEMENTAL MEMORANDA TO THE SECRETARY OF WAR ON THE BRIDGE-
PORT LABOR AWARD CASES.

There seems to be no agreement, express or implied in fact, to reimburse the contractors for the advance in wages provided by the award of the War Labor Board. Nevertheless, the contractors have, at the request of the Government, altered their position in the execution of their contracts by permitting the substitution of the action of a governmental agency for the free play of the market in the determination of their labor costs. If this has resulted in increased costs to them, there seems to be no reason why the Government should not pay the difference just as it would if it had imposed any other amendment to the contract or any change in specifications upon the contractor which increased costs to him. The Government has received what it conceived to be the benefit to its general program of a general stabilization of labor conditions in the Bridgeport district, and, under all the circumstances of the case, an obligation of a quasi-

contractual nature arose in favor of the contractor to make him whole for such loss as resulted to him in conferring this benefit. But the measure of that loss will not necessarily be the increase in wages provided by the award. That increase, in whole or in part, may have been what the contractor would, in any event, have had to meet as a result of the threatened labor difficulties which the submission to the award averted, or may be no more than the contemplated at the time he estimated the costs of the contract. It is obvious that it will be extremely difficult for the contractors to establish the measure of any award which should be paid them under these circumstances, but it should be possible for the Department to meet any cases of real hardship that its action has entailed. The problem is closely akin to that arising under the labor-dispute clause and should be handled by the same settlement officer.

Where the production agreement, by reason of proxy signature or otherwise, was not properly executed in accordance with law, a just and equitable adjustment of that agreement will involve an adjustment of this incident to it. If any of the production agreements were properly executed, the adjustment can be made on the implied agreement to pay any loss, as above defined, resulting from the acceptance of the arbitration at the Government's request.

G. H. DORR,
Special Adviser.

It has been suggested that an implied contract be established whereby the contractor should be reimbursed, not to the extent of the increases in wages awarded by the War Labor Board, but only to the extent of the difference between the increase in wages ordered by the Board and such increase as the contractor would have had to pay had the labor dispute not been submitted to arbitration.

It appears to me that it is quite impossible to determine what the claimants' labor costs would have been had the matter not been submitted to arbitration. At the time when the Government urged the claimants to submit the matter to arbitration there were two courses open to the contractors; they could either submit to arbitration, or, by refusing to arbitrate, take their chances of losses by reason of any and all the future uncertainties which they would then face, including the possibility of losses through cessation of operations during strikes, the possibility that their employees would force them to pay higher rates of wages than would have resulted from arbitration, and the possibility of loss of future profits through their plants being commandeered as a result of their failure to perform their contracts.

At the time of the negotiations from which an agreement is sought to be implied, the extent of expenses, losses, and increased labor costs

which would result from a refusal to arbitrate were wholly unknown, and must necessarily remain forever unknown if the Bridgeport manufacturers complied with the Government request that they arbitrate the labor disputes. I think it cannot be assumed that the parties intended that upon the dispute being submitted to arbitration the claimants should receive compensation based on an attempt to estimate the very uncertainties which by the arbitration they sought to avoid. Such an attempt to determine what losses the claimant would have suffered had he followed a course radically different from that which in fact was followed seems to me to bear no resemblance to a determination of the amount due a contractor under a labor clause, on account of the actual payment of wages in excess of those contemplated at the time the contract was signed. If it be considered that the claimants' contention rests on quasi contract rather than on contract, or that the implication sought to be drawn is one of law and not of fact, the same considerations apply, for the law cannot reasonably imply an agreement or quasi agreement to do the impossible, or to make compensation on a basis which in its very nature is impossible of ascertainment.

Furthermore, the entire argument in behalf of claimants seems to overlook the fact that the request of the Government was directed equally to the two parties to a controversy, the employers and the employees. Their differences threatened the public interest. The Government requested that they submit their differences to arbitration. Obviously the result of wage arbitration might turn out to be unsatisfactory to either or both parties, and either or both might consider that they had suffered loss through compliance with the Government's request. It may well be contended that it is no more reasonable to imply a promise to reimburse the employer, in case the result of arbitration turns out to be unsatisfactory to him, than it is to imply an agreement to compensate the employees in case the result of the arbitration turns out to be unsatisfactory to them. In my opinion no such implication arises, either in fact or in law, in favor of either party to the arbitration.

R. C. GOODALE,
Special Adviser.

JULY 2, 1920.

Cases Nos. 1979, 2167, and 1993.

***In re* CLAIMS OF AMERICAN TUBE & STAMPING CO., A. P. SWOYER CO.,
AND BRIDGEPORT BRASS CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

On January 27, 1920, the Board of Contract Adjustment rendered a decision in the following cases, granting claimants partial relief. On appeal to Secretary of War, case remanded for further proceedings. (See Vol. III, these decisions, p. 709.)

These claims come to me on appeal from decisions of the Board of Contract Adjustment.

Upon consideration of the several records, it is directed that further proceedings be had by the War Department Claims Board in accordance with the attached recommendation of the Special Advisers.

In making the final adjustment of these claims it is suggested that advantage be taken of the special knowledge and experience of Capt. Frank Moorman, C. A. C., who has had charge of the settlement of a large number of claims arising under similar contracts.

NEWTON D. BAKER,
Secretary of War.

Case No. 1979.

***In re* CLAIM OF AMERICAN TUBE & STAMPING CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

Re: Reimbursement for increased labor costs.

JUNE 30, 1920.

MEMORANDUM FOR THE SECRETARY OF WAR.

After careful examination of the questions presented we recommend that the decision of the Board of Contract Adjustment be approved, except in so far as the same directs reimbursement for increased labor costs under the "Labor disputes" clause in Contracts P-15611-3727-A and G-1052-563-A. The Board of Contract Adjustment finds that an addition to the contract price named in these contracts was directed as part of the settlement effected by the War Labor Board, and assumes, without discussion, that such addition to the contract price should be equal to the increase in wages directed by the War Labor Board, regardless of all other considerations. We do not concur in these conclusions. The terms of the so-called "labor clause" merely authorize the Secretary or his representative to direct a "fair and just addition" to the contract price. What addition is fair and just in any particular case depends upon many circumstances other than the mere amount of the increase in wages directed. For example, a manufacturer who is asked to bid upon Government work may make his estimate upon the basis of a probable 20 per cent increase in labor costs. Such a bid may be accepted by the Government as fair and reasonable for the reason that an analysis of the same indicates that the contractor will receive only a reasonable profit over and above the increased labor costs then anticipated. Such a contract having been executed, the contractor may refuse to voluntarily pay any increase in wages to his employees, and a strike ensuing, the United States may be called upon to take action under the "labor disputes clause," and may direct an increase in wages pursuant thereto. In such a situation it is clear that it is not fair and equitable that the United States should allow any increase in the contract price. Similarly, cases must arise in which wages actually paid by a particular Government contractor are below the prevailing scale of wages in the community in which the contract is being performed and below the rate of wages at which the contractor could

reasonably have expected to be allowed to perform his contract. In such a case, if wages paid by the contractor are directed to be raised merely to the prevailing standard of wages which the claimant must have anticipated as necessary for him to pay in order to complete the contract, no increase in the contract price should be allowed, while if by direction of the United States wages are increased to a figure above the prevailing or probable scale according to which the contract price was originally fixed, the contractor should ordinarily be allowed reimbursement to the extent of that portion of the added labor costs which represents increases above the scale of wages on which the contract price was based.

We therefore recommend that the record be returned to the Board of Contract Adjustment with instructions to determine, or cause to be determined, what amount, if any, will constitute a fair and just addition to the contract price in accordance with the general principles above outlined.

This recommendation applies in all essential particulars to the cases of A. P. Swoyer Co., Case No. 150-C-2167, and Bridgeport Brass Co., Case No. 150-C-1993.

STANTON J. PEELLE,
R. C. GOODALE.

Special Advisers to the Secretary of War.

JULY 23, 1920.

Cases Nos. 1821, 1825, 1914, 1832, 1911, 1935, 1831, 1835, 2001, 1913, 1910, 1826, 2010, and 1824.

***In re* CLAIMS OF THE BARRETT CO., LA BELLE IRON WORKS, REPUBLIC IRON & STEEL CO., SEMET SOLVAY CO., BRIER HILL STEEL CO., TOLEDO FURNACE CO., YOUNGSTOWN SHEET & TUBE CO., BETHLEHEM STEEL CO., UNITED FURNACE CO., GULF STATES STEEL CO., INLAND STEEL CO., LACKAWANNA STEEL CO., CITIZENS GAS CO., AND ZENITH FURNACE CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

On May 27, 1920, the Board of Contract Adjustment rendered decisions in the following cases, granting claimants partial relief. On appeal to Secretary of War, decision of Board affirmed. (See Vol. V, these decisions, p. 828.)

These claimants, who have orally presented before me their appeal from the decisions rendered by the Board of Contract Adjustment in these matters, contend that the Board has done an injustice in connection with the determination of the compensation to be allowed them for crude toluol on hand at the time of the termination of the compulsory order, through limiting such compensation to the *cost* of the crude toluol, including labor, material, and proportionate overhead expense, plus an allowance by way of profit or compensation for services rendered on a basis not exceeding 10 per cent, with provision for additional compensation in exceptional cases as provided in Supply Circular 19, War Department, 1919.

Toluol being a minor by-product of materials primarily purchased and expended for the production of other products, such as illuminating gas, coke, etc., it would seem to be impossible to ascertain with exactitude the cost of the labor and material which can fairly be considered as entering into the production of crude toluol. Equally obvious is the fact that an allowance to claimants on the basis demanded by them—namely, \$1.50 per gallon for the toluol content of all crude toluol and toluol-producing materials remaining on hand upon termination of the compulsory order, less cost of extracting and refining such toluol content or crude toluol—would result in the payment of anticipated profits—that is to say, profits which under the contract would have accrued through the performance of operations which have not been actually performed and through the delivery of a completed product which has never been delivered.

It seems to me clear that the compulsory order is an order for refined toluol to the extent of the production capacity of each pro-

ducer, and an order for crude toluol to the extent of the production capacity of producers of crude toluol who were unable to refine all the toluol which they produced. The Board of Contract Adjustment was, therefore, correct in its conclusion that crude toluol and toluol-producing materials should in the settlement of these claims be treated as raw materials and materials in process, and not as finished product, except in the case of crude toluol in the hands of producers unable to refine it.

In the adjustment of claims such as these, in which the exact costs of materials on hand can not be determined with accuracy, it should be borne in mind that the maximum compensation allowable under the Dent Act is that proportion of the contract price which is proportionate to the stage of completion of the materials on hand, as compared with the finished product, such compensation not exceeding, however, the contract price less cost of completion. In other words, if it should be found by the Board that the crude toluol and toluol-bearing materials on hand at the time of suspension represented in material, labor, and supervision 60 per cent of the value of the material, labor, and supervision which would have gone into the completed product, then 60 per cent of the purchase price per gallon of toluol, provided it does not exceed the contract price minus cost of completion of the product, is the maximum compensation allowable under the Dent Act. Claimants are not always entitled to compensation on as liberal a basis as this, such adjustment being under established practice, normally based on cost plus a percentage not exceeding 10 per cent of the cost of materials in process, and such compensation being considered to constitute a fair adjustment of uncompleted contracts, even in those cases in which the profit upon completion of the contract would have been much more than 10 per cent. These principles are here called attention to for the reason that the peculiar difficulties in computing the cost of a product of this character render it necessary that they be constantly borne in mind by the officials charged with negotiating the actual settlement.

Subject to the above comments, the decision of the Board of Contract Adjustment in regard to these claims is approved, but with the direction (which seems necessary in order to give reality and effect to the claimants' appeal) that the final decision and award in these cases shall be referred to me for consideration before final action is taken by the Department.

NEWTON D. BAKER,
Secretary of War.

JULY 26, 1920.

Case No. 1829.

In re **CLAIM OF PENNSYLVANIA TANK CAR CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

On March 27, 1920, the Board of Contract Adjustment rendered decision granting claimant partial relief. On appeal to Secretary of War, decision affirmed. (See Vol. IV, p. 719.)

The claimant here received a definite order from the Government for 660 tank cars for delivery in January, February, and March, 1919, for prices which aggregated upon the entire order about a million and a half dollars. The order was accepted and a contract thereby made on October 21, 1918. On November 26, 1918, the armistice having intervened, further performance on the contract was suspended at the request of the Government. No deliveries had been made, but the claimant clearly had made expenditures and was entitled to the benefit of a fair adjustment of them under the Dent Act. Agencies of the War Department have satisfactorily disposed of the questions involved except the claim for that part of its "general plant overhead" for the months of January, February, and March, 1919, which would have been met out of payments under the Government contract had it not been suspended, and which claimant was unable to absorb by other obtainable commercial work.

The Board of Contract Adjustment by its decision returns the claim to the Chief of Engineers for further proceedings, recognizing a certain propriety in the general plant overhead item, but expressing the opinion that the allowance upon it should be limited to the losses incurred in the month of January, 1919. This limitation seems to me to be arbitrary. It will be difficult, and may be impossible, to determine what the claimant's losses on this account actually were. The contract was in force about 35 days. During that time had the Government to the extent of this contract not preempted the manufacturing capacity of the claimant it is possible that other work would have been secured which would have fully occupied its facilities. It is, of course, possible that no other work could have been secured and claimant's facilities would therefore have been idle. It is not just to the Government, nor does justice to the claimant require it, that this doubt be resolved by mere guess in favor of the claimant. The Government will have done its full duty if it pays what can reasonably be supported as due after considering the nature of the claimant's business, its past experience in securing orders during the

month of November for deliveries in the subsequent January–March periods, the condition of the market in November, 1918, and the subsequent months for wares of the kind the claimant was equipped to make, and any other facts which make it more or less probable that losses sustained by the claimant were caused by the existence and suspension of the Government contract. Whatever can be thus fairly shown should be awarded, whether occurring in January, 1919, or later. If none or only a part of the amount of the claim can by proof or reasonable inference be found to have been so caused, the Government and the claimant equally face a case in which neither is to blame, and both law and equity are better satisfied by the negative justice resulting from the insusceptibility of proof than they could be by any positive injustice done by baseless assumption of facts or chance.

The decision of the Board of Contract Adjustment is therefore affirmed, to be applied as here modified and interpreted.

NEWTON D. BAKER,
Secretary of War.

JUNE 30, 1920.

MEMORANDUM FOR THE SECRETARY OF WAR.

This case comes to you on appeal from the Board of Contract Adjustment, that Board having rejected the claim as not coming within the act of March 2, 1919.

On October 19, 1919, through an authorized officer an oral contract was entered into between the Government and the claimant company whereby there was allotted to the claimant a contract to build 360 flat and 300 tank cars for exportation, to be delivered in lots of 200 each in January, February, and March, and 60 in April, 1919, the Government to furnish the steel and finance the building of the cars if the claimant so desired.

The contract was canceled November 26, 1918. Prior to cancellation the claimant, through subcontractors, had purchased materials for use in the cars to be so built amounting in the aggregate to \$14,250.49, which amount had been approved for payment, if not already paid, and is, therefore, no longer involved in this claim.

Whatever other expense was incurred for materials was absorbed in other work at a profit, so the only claim here for consideration, as testified to by the vice president of the claimant company (p. 32), is for reimbursement for money expended in keeping the "organization together" in January, February, and March, 1919. There is no claim for expenditures or for obligations incurred in preparation for performance of the contract, for, as testified by the vice president (p. 11), "there was no occasion for making any preparations, as I

know of, to increase it to take care of the Government business, because the deliveries were only normal shop capacity."

The loss claimed, therefore, is arrived at by taking the total cost of operating the plant, with the diminished force and orders, in January, February, and March, 1919, amounting to \$49,347.75, deducting therefrom \$13,393.85, which was absorbed in work done during those months, leaving \$36,003.40, which latter sum is, upon some theory, divided by the 600 cars to be delivered in these months, equal to \$60 per car, or \$3,600, making the amount claimed \$39,603.40.

Prior to January 1, 1919, the claimant was operating its plant with about 200 men, but during the months of January, February, and March it reduced its force to about 75 men. With this limited force claimant was enabled to build and repair cars as set forth in its claim filed herein.

The act of March 2, 1919, authorizes the Secretary of War "to adjust, pay, and discharge any agreement, express or implied, upon a fair and equitable basis that has been entered into in good faith during the present emergency and prior to November twelfth, nineteen hundred and eighteen, by any officer or agent acting under his authority, direction or instruction * * * when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation, prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law."

The purpose of the act as expressed in section 1 is to reimburse the claimant for losses sustained "when such agreement has been performed in whole or in part or expenditures have been made or obligations incurred upon the faith of the same by any such person" prior to November twelfth, nineteen hundred and eighteen. But in the first proviso to said section such remuneration is extended to expenditures and obligations or liabilities necessarily incurred in performing or *preparing* to perform such contract or order.

But as there were no expenditures other than those to subcontractors or such as were absorbed in other words at a profit, there seems no basis for the origin of the claim prior to the cancellation of the contract—that is to say, at the time of the cancellation of the contract there was no element upon which the damages could be measured. When the contract was canceled, it could not be known but that by diligence the claimant might by renewed solicitations prevent loss, in which case no damages would arise out of the cancellation of the contract.

The act clearly contemplates reimbursement when such informal contract has "been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by

any such person," prior to November twelfth, nineteen hundred and eighteen.

And as the claim here in controversy does not come within the provisions of the act, it is recommended that the decision of the Board of Contract Adjustment be approved and affirmed.

STANTON J. PEELLE,
Special Adviser to the Secretary of War.

JULY 26, 1920.

MEMORANDUM FOR THE SECRETARY OF WAR.

The Pennsylvania Tank Car Co. received and accepted on October 21, 1918, a Government order for 660 cars at prices aggregating approximately \$1,500,000. These cars were for delivery during January, February, March, and April, 1919. On November 26, 1918, the performance of the contract was suspended at the request of the Government and claimant was advised that the cars would not be required. The present claim is for certain minor preliminary expenses incurred in connection with this order and for expenses in the sum of \$39,603.40, representing

"general plant overhead during January, February, March, and April, 1919, which claimant alleges as direct cost, to wit, by reason of suspension of orders, deliveries under which were to occur in January, February, March, and April, 1919, and which cost could not be absorbed by other obtainable commercial work."

The Board of Contract Adjustment by its decision directs that the claim be returned to the Claims Board, Office of the Chief of Engineers, War Department, for adjustment, but expresses the opinion that the loss suffered by claimant during January, 1919, is the maximum which can be allowed under this item.

It is at once evident that in order to effect settlement on a fair and equitable basis compensation must under certain circumstances be made to cover necessary factory overhead, such as taxes, insurance, salaries of essential personnel, and the like, for all or some part of the period during which a contractor would have been assured of reimbursement of such expenses under his Government contract had the same not been suspended.

An illustration of this would occur in the case of a mill engaged in a seasonal industry. If the Government engaged in advance in the entire output of such a mill for a season, agreeing to supply the necessary material, and at the opening of the season, and after it was too late for the mill to secure other business, canceled the contract, it would be clear that the Government would be bound to hold the mill harmless as to its necessary overhead expense for the season, at least to such extent as it could reasonably be assumed such

expenses would have been recouped out of other business had the Government contract never been made. And the Government, having by its own authority and without the consent of the Contractor suspended or breached its agreement, would not be justified in denying such reimbursement merely because the contractor could not make absolute legal proof that if it had not been for the Government contract, he would have obtained other profitable business. On the other hand, if the yearly contract with such a factory had been made on November 10 and canceled on November 11, with no indication of the contractor having lost any opportunities for commercial business by reason of his having accepted the Government order, it seems to me clear that a fair and equitable adjustment, exclusive of anticipated profits, would not necessarily require that the contractor be compensated for any part of his unabsorbed factory overhead for the season.

In the present case, the evidence shows that the contract was in effect for about 35 days. It was not shown whether the condition of the market in the fall of 1918 was such that claimant would have been likely to secure commercial business to keep its plant going during the spring of 1919 had the Government contract not been accepted. The Board of Contract Adjustment in expressing the opinion that such compensation should be limited to the month of January may well have taken into account the normal inference that claimant's commercial sales were held up for only approximately 30 days, and that reimbursement to the extent of its unabsorbed overhead during January, 1919, would put the claimant in the same position in which it would have been had the Government order never been received. I find nothing in the record tending to indicate that such is not the case, and the Claims Board, Office of Chief of Engineers, is by the terms of the decision left free to make such adjustment as further examination of the facts may show to be just.

It is accordingly recommended that the decision of the Board of Contract Adjustment be affirmed.

R. C. GOODALE,
Special Adviser to the Secretary of War.

JULY 26, 1920.

MEMORANDUM FOR THE SECRETARY OF WAR.

After careful consideration of the record, we recommend that the decision of the Board of Contract Adjustment in this matter be affirmed.

HERBERT H. LEHMAN,
Special Adviser to the Secretary of War.

JULY 26, 1920.

Case No. 2254.

In re **CLAIM OF DILL & COLLINS CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

This case was decided by the Board of Contract Adjustment on March 26, 1920, relief being granted in part. On appeal to the Secretary of War, the decision of the Board of Contract Adjustment was affirmed. (See Vol. IV, these decisions, p. 669.)

After careful consideration of the record in this matter the decision of the Board of Contract Adjustment is hereby affirmed in accordance with the accompanying recommendations of the Special Advisers.

NEWTON D. BAKER,
Secretary of War.

MEMORANDUM FOR THE SECRETARY OF WAR.

The decision of the Board of Contract Adjustment, holding that the purchase order and the supplemental agreement respecting the advance of \$250,000 by the Government to enable the claimant company to increase its facilities so as to produce daily 16,800 pounds of liquid chlorine, correctly sets forth the respective rights of the parties; and their rights having been determined, in case of the termination of the contract, the Government is under no obligations to increase its advances to meet additional costs of facilities nor does any implied contract arise obligating the Government therefor.

Under the terms of the contract the claimant company was to have submitted to the Government a program for the increase of its facilities and obtain the approval of the Government. Had this been done, the Government would have been advised of the cost above the estimate at the time the contract was entered into; and the failure of the claimant company to so submit the program creates the inference that such additional cost added to the value of the plant for the claimant company's own use, and such was the view of the Board.

The findings of the Board are in accord with the evidence, and the decision of the Board is therefore approved.

STANTON J. PEELLE,
Special Adviser to the Secretary of War.

JULY 26, 1920.

MEMORANDUM FOR THE SECRETARY OF WAR.

Careful examination of the record makes it clear that there was no agreement, express or implied, on the part of the United States to pay the excess cost of the additional facilities here sought to be recovered. On the contrary, the Dill & Collins Co. had, under the formally executed contract, unconditionally obligated itself to provide the facilities in question without limitation as to their cost. The fact that the buildings and equipment cost more than was estimated is immaterial in so far as the liability of the United States is concerned. The parties to the contract had chosen to definitely fix in dollars and cents the sum which the United States should contribute toward the cost of claimant's increased facilities. The United States would be bound to pay that sum, even had the facilities cost less than was anticipated, and is under no obligation to pay more if they cost more. The fact that the sum agreed upon to be contributed by the United States was *arrived at* by means of a proportionate division of the estimated cost of facilities is immaterial, since the ultimate agreement of the parties was not that the United States should pay a certain proportion of the cost, but that it should in any event pay for the facilities neither more nor less than an agreed sum in dollars, namely, \$150,000.

It is accordingly recommended that the decision of the Board of Contract Adjustment be approved and affirmed.

R. C. GOODALE,
Special Adviser to the Secretary of War.

AUGUST 2, 1920.

Case No. 1929.

In re CLAIM OF BELDEN-PORTER-GRAY CO.

ON APPEAL BEFORE THE SECRETARY OF WAR.

(See Vol. II, these decisions, p. 771.)

After careful consideration of the record in this matter, the decision of the Board of Contract Adjustment is hereby affirmed in accordance with the accompanying recommendation of the special advisers.

It is further directed that the entire record be transmitted to the Auditor for the War Department for his information and that the claimant be advised that any further application for the relief here sought should be addressed to the Auditor for the War Department or to the Comptroller of the Treasury of the United States.

NEWTON D. BAKER,
Secretary of War.

MEMORANDUM.

This seems to be a case of great hardship to the claimant, but the sole possible relief would be by reformation of the formal contract. The finding of the Board that the Secretary has no jurisdiction to grant such relief when such contract has been completed and paid is in accord with many former decisions.

I recommend that the Board's decision be affirmed.

E. HENRY LACOMBE,
Special Adviser.

JULY 28, 1920.

I concur in the above conclusion. As the application of the claimant has been dismissed as not properly coming before the Board of Contract Adjustment, and without passing upon the merits of the claim, I recommend that the record be transmitted to the Auditor for the War Department for his information and that the claimant be advised that any further application for the relief here sought should be addressed to the Auditor for the War Department or to the Comptroller of the Treasury of the United States.

R. C. GOODALE,
Special Adviser to the Secretary of War.

AUGUST 4, 1920.

AUGUST 17, 1920.

Case No. 2522.

In re **CLAIM OF R. H. LONG CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

For decision of Board of Contract Adjustment, see Volume IV, these decisions, page 1436.

Upon careful consideration of the record in this matter, the decision of the Board of Contract Adjustment is hereby affirmed in accordance with the accompanying recommendations of the special advisers.

NEWTON D. BAKER,
Secretary of War.

AUGUST 9, 1920.

MEMORANDUM FOR THE SECRETARY OF WAR.

I recommend that the finding of the Board of Contract Adjustment be affirmed.

The evidence wholly fails to establish any agreement, either express or implied, as required by the Dent Act.

During the greater portion of the period in which the petitioner claims the implied agreement was entered into, I was in charge of the equipment section, Ordnance Department, of which the branch purchasing textiles was a part.

I therefore can state from my own knowledge that Col. Coriell's testimony accurately describes the situation and the policy pursued by him in the procurement of textiles. Both Col. Coriell and his assistant, Major Richmond, were at all times opposed to encouraging equipment manufacturers in the purchase or manufacture of textiles that went into the production of equipment.

There is no question that up to within a short time of the signing of the armistice cotton duck and webbing in nearly all sizes were in large demand and that their manufacture frequently resulted in large profit to the manufacturer. I have no doubt that the claimant, knowing this, proceeded to equip himself for the manufacture of textiles in the expectation of securing a profit additional to that which he expected to secure in the production of fabricated equipment.

In so equipping himself he acted on his own initiative and at his own risk, and without any agreement of any nature on the part of the Government.

HERBERT H. LEHMAN,
Special adviser to the Secretary of War.

MEMORANDUM.

We recommend that the findings of the Board of Contract Adjustment be affirmed.

The evidence wholly fails to establish any agreement, express or implied, as required by the Dent Act. Indeed, one might have inferred that this would be the result, in view of the statement by petitioner (Feb. 25, 1920) of his claim, that there was no definite agreement concerning quantity or price of the materials, but an assurance that webbing in large quantities was needed and that orders would be given for such kinds of webbings as were used in the contracts for textile goods "*needed for the Army.*" Orders were given while the goods were needed for the Army, but with the Armistice the need ceased and the orders ceased with it.

E. HENRY LACOMBE,
R. C. GOODALE,
Special Advisers.

JULY 20, 1920.

AUGUST 28, 1920.

Case No. 2096.

In re **CLAIM OF RICH TOOL CO. AND ATLAS CRUCIBLE STEEL CO.**

APPEAL BEFORE THE SECRETARY OF WAR.

On March 24, 1920, a decision was rendered by the Board of Contract Adjustment denying claimant relief. On appeal to Secretary of War, decision affirmed. (See Vol. IV, these decisions, p. 608.)

Upon consideration of the record in this matter the decision of the Board of Contract Adjustment is hereby affirmed in accordance with the accompanying recommendations of the Special Advisers.

NEWTON D. BAKER,
Secretary of War.

MEMORANDUM.

It is difficult to see on what theory the Board could have disposed of this case differently.

It is contended in the brief filed on appeal that the agreement between the Rich and the Atlas Cos. providing for cancellation in the event of termination of the war (except as to what was then completed or in process) was a mere "gentlemen's agreement," which for some reason or other did not affect this contract. Counsel who appeared for the Board, however, insisted continuously from p. 16, S. M., to the end that it was a general agreement covering all contracts, including this one. And the testimony of the witness Vin-nedge, who represented the Atlas at the Rich plant, to the same effect stands wholly uncontradicted in the record.

I recommend that the decision of the Board be affirmed.

E. HENRY LACOMBE,
Special Adviser.

AUGUST 26, 1920.

AUGUST 16, 1920.

MEMORANDUM FOR THE SECRETARY OF WAR.

I have carefully gone through the record of this case and recommend that the Secretary approve the decision of the Board of Contract Adjustment for the reasons set forth therein.

HERBERT H. LEHMAN,
Special Adviser to the Secretary of War.

AUGUST 30, 1920.

The order here involved, signed by Rich Tool Co. and addressed to Atlas Crucible Steel Co., contains an express provision that the Rich Tool Co. "will supply the necessary ore to make the steel covered by this order." Having itself undertaken to supply the necessary ore, the Tool Co. clearly is under no obligation to protect the Steel Co. on a commitment which, so far as the record shows, the Steel Co. was neither required nor authorized to make.

I therefore recommend that the action of the Board in denying claimant relief be affirmed.

R. C. GOODALE,
Special Adviser.

AUGUST 28, 1920.

Case No. 744.

In re **CLAIM OF ROBERT G. LASSITER & CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

This claim was decided by the Board of Contract Adjustment adversely to claimant on November 6, 1919. (See Vol. II, these decisions, p. 250.)

Upon careful consideration of the record in this matter, the decision of the Board of Contract Adjustment is hereby affirmed in accordance with the accompanying recommendation of the Special Advisers.

NEWTON D. BAKER,
Secretary of War.

AUGUST 21, 1920.

MEMORANDUM FOR THE SECRETARY OF WAR.

For the reasons stated in the accompanying decision of the Board of Contract Adjustment, we recommend that the Board's denial of this claim be affirmed.

R. C. GOODALE,
STANTON J. PEELLE,
Special Advisers to the Secretary of War.

MARCH 12, 1921.

Case No. 3030.

In re **CLAIM OF THE L. K. COMSTOCK CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

This claim was disposed of by the Appeal Section, War Department Claims Board, December 21, 1920, by denying relief to claimant. On appeal to the Secretary of War, decision affirmed. (See Vol. VIII, these decisions, p. 332.)

Upon consideration of the appeal and record in the foregoing case, the action of the Appeal Section denying relief is affirmed.

JOHN W. WEEKS,
Secretary of War.

MARCH 12, 1921.

Case No. 3034.

In re **CLAIM OF THE COMMERCIAL BANK OF SPANISH AMERICA.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

Upon appeal to the Secretary of War, the decision of the Appeal Section, War Department Claims Board, dated February 26, 1921, was affirmed. (See Vol. VIII, these decisions, p. 655.)

Upon consideration of the appeal and record in the above-entitled case, I am convinced that I should not disturb the action of the Appeal Section, War Department Claims Board, in denying relief, leaving claimant to such redress, if any, as it may have in the Courts.

JOHN W. WEEKS,
Secretary of War.

MARCH 14, 1921.

Case No. 2777.

***In re* CLAIM OF THE FOUNDATION CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

This claim was decided by the Appeal Section, War Department Claims Board, July 23, 1920, relief being denied. Claimant requested a rehearing, which was granted, and on January 3, 1921, another decision was rendered affirming and approving the previous decision. Claimant then appealed to the Secretary of War, who, on March 14, 1921, directed that the decision of the Appeal Section be vacated and action taken in accordance with memorandum of the vice chairman, War Department Claims Board. (See Vol. VII, p. 100; Vol. VIII, p. 417; and p. 733.)

Upon consideration of the appeal and record in this case, I am convinced that action should be had in accordance with the memorandum of the vice chairman, War Department Claims Board, of March 12, 1921.

By authority of the Secretary of War, the record is returned to the Appeal Section with instructions to vacate the decision of January 3, 1921, and for action in accordance with the memorandum of the vice chairman above referred to.

**W. R. WILLIAMS,
*Asst. Secretary of War.***

MEMORANDUM FOR THE SECRETARY OF WAR.

This is a claim unde C. O. 103 for \$24,147.34. Relief was granted by the Board of Contract Adjustment May 3, 1920. On request of the Claims Board, Chemical Warfare Service, the case was reconsidered and decision denying relief rendered by the Appeal Section, dated July 1, 1920. Claimant thereupon requested and was granted rehearing and further evidence was taken, and a decision adverse to claimant was rendered by the Appeal Section January 8, 1921, speaking through Maj. Hill, Member, who in September recommended that a rehearing be granted.

The case arises on a formal contract with the Foundation Co. for the construction of a plant at Edgewood Arsenal, in which contract it was provided that a commissary for the benefit of the workmen be

maintained, and all revenue from the operations of the commissary be accounted for by the contractor and be applied to reduction in the cost of the work.

During the progress of the work, and to effect the accounting for the expenses and receipts of the commissary, a system of tickets was introduced. Claimant until recently insisted that it was bound only to account for the number of meals served. The position of the Government has been virtually that the company was bound to account for all tickets which had been printed. To me both contentions are without real foundation. The Government is primarily only concerned with the cost and the revenues for the maintenance of the commissary. There is nothing sacred about the tickets, as they were only a means to the end—namely, a proper accounting. This apparently is the present position of claimant company, and it is unfortunate that this attitude was not sooner adopted, as long proceedings might have been avoided.

Since the hearing of July and upon the failure of the Government to audit the books of the contractor they have been audited at the request and expense of claimant by a reputable, independent firm, and all the revenues have now been set forth. In so far as the books and records show, the total revenue obtained from the sales and meal tickets amounts to \$175,297.39. Anyone conversant with such enterprises; either in or without the Army, knows that there are certain indeterminate losses and certain indeterminate gains. It is impossible without the expenditure of a sum not justified by the facts to prevent dishonest obtaining or use of tickets. This is a loss in maintenance that is bound to occur, and one which the company can not be held to be an insurer against. On the other hand, where tickets are used and where there is a large turnover of labor, such as existed during the construction of this plant, many tickets which have been paid for were carried off by those to whom they had been sold and never presented. Such carrying away and destruction of tickets is a profit, and should, unless the conditions are unusual, have exceeded the losses above indicated. The fact that these two elements of the case can not be determined with mathematical exactness does not mean that the Government is justified in retention of the maximum amount of money that ingenuity can suggest. This should be determined as accurately as possible between the Government and claimant, and the indeterminate amounts be mutually arrived at by the exercise of some discretion and good faith.

There are a few other items for which the contractor can be justly charged. He claims to have supplied tickets free to soldiers, under the impression that he would be reimbursed, to the amount of \$5,321.53. Credit sales of tickets not collected amounted to about \$3,000, while there was an embezzlement of an employee of the con-

tractor, for which he is justly responsible, to the sum of \$3,000. Adding these amounts together with the sum of \$1,500, profit and loss from the use of the tickets, which sum was suggested by me and accepted by claimant's attorney (without prejudice), I believe that the proper settlement in this case should be based on the figure of \$188,118.92 as the total revenue to be charged, as received by claimant from the operation of the commissary.

The Government has charged the claimant as revenue received \$208,275.67, which leaves a net balance of \$20,156.75.

It is therefore recommended that the decision of the Appeal Section of January 3, 1921, be vacated and findings be entered in accordance with this memorandum.

Respectfully,

J. A. HULL,
Vice Chairman, War Department Claims Board.

MARCH 19, 1921.

Case No. 2777.

In re CLAIM OF THE FOUNDATION CO.

(See Vol. VII, p. 100; Vol. VIII, p. 417; and p. 730.)

Maj. Hill writing the opinion of the Board.

ON RECONSIDERATION.

1. This is a claim under G. O. 103 for \$24,147.34, from a decision of the Appeal Section dated January 3, 1921, reported in Decisions, Vol. VIII, p. 417, denying relief; claimant appealed to the Secretary of War.

2. This case was returned to this Section with the following order of the Secretary of War, dated March 14, 1921:

"Upon consideration of the appeal and record in this case, I am convinced that action should be had in accordance with the memorandum of the Vice Chairman, War Department Claims Board, of March 12th, 1921.

"By authority of the Secretary of War, the record is returned to the Appeal Section with instructions to vacate the decision of January 3d, 1921, and for action in accordance with the memorandum of the Vice-Chairman, above referred to.

"W. R. WILLIAMS,
"Asst. Secretary of War."

3. The memorandum of the vice chairman, War Department Claims Board, dated March 12, 1921, is as follows:

"This is a claim under G. O. 103 for \$24,147.34. Relief was granted by the Board of Contract Adjustment May 3d, 1920. On request of the Claims Board, Chemical Warfare Service, the case was reconsidered and decision denying relief rendered by the Appeal Section dated July 1st, 1920. Claimant thereupon requested and was granted rehearing and further evidence was taken, and a decision adverse to claimant was rendered by the Appeal Section, January 3d, 1921, speaking through Major Hill, Member, who in September recommended that a hearing be granted.

"The case arises on a formal contract with The Foundation Company for the construction of a plant at Edgewood Arsenal, in which contract it was provided that a commissary for the benefit of the workmen be maintained, and all revenue from the operations of the commissary be accounted for by the contractor and be applied to reduction in the cost of the work.

"During the progress of the work, and to effect the accounting for the expenses and receipts of the commissary, a system of tickets was introduced. Claimant, until recently, insisted that it was bound only to account for the number of meals served. The position of the Government has been virtually that the company was bound to account for all tickets which had been printed. To me both contentions are without real foundation. The Government is primarily only concerned with the cost and the revenues for the maintenance of the commissary. There is nothing sacred about the tickets as they were only a means to the end, namely, a proper accounting. This apparently is the present position of claimant company, and it is unfortunate that this attitude was not sooner adopted, as long proceedings might have been avoided.

"Since the hearing of July and upon the failure of the Government to audit the books of the contractor, they have been audited at the request and expense of claimant, by a reputable, independent firm, and all the revenues have now been set forth. Insofar as the books and records show, the total revenue obtained from the sales and meal tickets amounts to \$175,297.39. Anyone conversant with such enterprises, either in or without the Army, knows that there are certain indeterminate losses and certain indeterminate gains. It is impossible without the expenditure of a sum not justified by the facts to prevent dishonest obtaining or use of tickets. This is a loss in maintenance that is bound to occur, and one which the company cannot be held to be an insurer against. On the other hand, where tickets are used and where there is a large turnover of labor such as existed during the construction of this plant, many tickets which have been paid for were carried off by those to whom they had been sold and never presented. Such carrying away and destruction of tickets is a profit and should, unless the conditions are unusual, have exceeded the losses above indicated. The fact that these two elements of the case cannot be determined with mathematical exactness does not mean that the Government is justified in retention of the maximum amount of money that ingenuity can suggest. This should be determined as accurately as possible between the Government and claimant, and the indeterminate amounts be mutually arrived at by the exercise of some discretion and good faith.

"There are a few other items for which the contractor can be justly charged. He claims to have supplied tickets free to soldiers under the impression that he would be reimbursed, to the amount of \$5,321.53. Credit sales of tickets not collected amounted to about \$3,000.00; while there was an embezzlement of an employee of the contractor for which he is justly responsible, to the sum of \$3,000.00. Adding these amounts together with the sum of \$1,500.00, profit and loss from the use of the tickets, which sum was suggested by me, and accepted by claimant's attorney (without prejudice) I believe that the proper settlement in this case should be based on the figure of \$188,118.92, as the total revenue to be charged, as received by claimant from the operation of the commissary.

"The Government has charged the claimant as revenue received, \$208,275.67 which leaves a net balance of \$20,156.75.

"It is, therefore, recommended that the decision of the Appeal Section of January 3d, 1921, be vacated, and findings be entered in accordance with this memorandum.

"Respectfully,

"J. A. HULL,
"Vice-Chairman, War Dept. Claims Board."

4. By direction of the Secretary of War, the decision of this Section dated January 3, 1921, denying relief is hereby vacated and set aside.

5. In accordance with the recommendation of the vice chairman, War Department Claims Board, as approved by the Secretary of War, this Section finds that claimant should be charged with the sum of \$188,118.92 as the total revenue to be charged as received by claimant from the operation of the commissary. As claimant was charged with the sum of \$208,275.67 as such revenue received, the net balance of \$20,156.75 is due and should be paid to claimant.

DISPOSITION.

The Appeal Section transmits its decision to the Chemical Warfare Section for appropriate action.

Lieut. Col. McKeeby and Lieut. Tabb concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

MARCH 15, 1921.

Case No. 2780.

In re **CLAIM OF THE PRECISION OPTICAL CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

- 1. CLAIM AND DECISION.**—This claim was decided adversely to claimant by the Appeal Section, War Department Claims Board, October 19, 1920. On appeal to the Secretary of War, decision affirmed. For statement of facts and decision, see Vol. VII, p. 951.)

Upon consideration of the appeal and record in the above-entitled claim, the decision of the Appeal Section is affirmed.

JOHN W. WEEKS,
Secretary of War.

MARCH 22, 1921.

Case No. 3021.

***In re* CLAIM OF THE W. H. LUTZ CO. (INC.).**

ON APPEAL BEFORE THE SECRETARY OF WAR.

This claim was decided adversely to claimant by the Appeal Section, War Department Claims Board, on December 18, 1920. On appeal to the Secretary of War, decision affirmed. (See Vol. VIII, p. 814.)

Upon consideration of the appeal and record in the foregoing case, the action of the Appeal Section, War Department Claims Board, is affirmed.

**JOHN W. WEEKS,
*Secretary of War.***

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MARCH 22, 1921.

Case No. 2919.

***In re* CLAIM OF THE AMERICAN CAN CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

This claim was decided adversely to claimant by the Appeal Section, War Department Claims Board, February 4, 1921. On appeal to the Secretary of War, decision affirmed. (See Vol. VIII, p. 587.)

Upon consideration of the appeal and record in the above-entitled case, the action of the Appeal Section denying relief is affirmed.

**JOHN W. WEEKS,
*Secretary of War.***

MARCH 23, 1921.

Case No. 3015.

In re **CLAIM OF J. E. LYONS.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

This claim was decided by the Appeal Section, War Department Claims Board, January 29, 1921, relief being denied. Claimant appealed to Secretary of War, who, on March 23, 1921, affirmed the decision of this Board. (See Vol. VIII, p. 540.)

Upon consideration of the appeal and record in the foregoing case, the decision of the Appeal Section, War Department Claims Board, is hereby affirmed.

JOHN W. WEEKS,
Secretary of War.

APRIL 1, 1921.

Case No. 3045.

In re **CLAIM OF THE GODDARD TOOL CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

The Appeal Section, War Department Claims Board, on February 3, 1921, rendered decision granting claimant partial relief. On appeal to the Secretary of War, affirmed. (See Vol. VIII, these decisions, p. 558.)

Upon consideration of the appeal and record in the above-entitled claim, the action of the Appeal Section, War Department Claims Board, is affirmed relative to relief for increased facilities. In regard to the question of 3,058.4 hours, it is directed that the Air Service Section, War Department Claims Board, in carrying out the instructions of the Appeal Section, grant a full opportunity to claimant to present such evidence as he may desire, showing the hours that are classed as indirect to have been, in fact, direct labor—that is, if the employee, although ordinarily on indirect labor, was taken away from indirect labor and put on direct labor in connection with the job in question, and was competent to do the work to which assigned—payment may be made. Such labor, however, must be in fact actually direct and applicable to the contract to be properly charged against the United States.

In those cases where the claimant can not show affirmatively the correctness of the charge, the decision of the Appeal Section denying relief will stand.

JOHN W. WEEKS,
Secretary of War.

APRIL 5, 1921.

Case No. 1970.

***In re* CLAIM OF JACOB GOLDMAN, RECEIVER FOR THE GAS OIL CHEMICAL CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

On February 21, 1921, a decision was rendered by the Appeal Section, War Department Claims Board, granting claimant partial relief. Upon appeal to Secretary of War, the decision was affirmed. For statement of facts in this case, see Volume IV, page 542; Volume VII, page 155, Vol. VIII, pages 389 and 629.

Upon consideration of the record in this case, the decision of the Appeal Section is affirmed.

In view of the dilatory action on the part of the claimants, I further direct that unless the decision of the Appeal Section is accepted on or before April 15 that a final order denying all relief so far as the War Department is concerned be entered in this case.

JOHN W. WEEKS,
Secretary of War.

FINAL ORDER DENYING RELIEF.

The claim of Jacob Goldman, receiver for the Gas Oil Chemical Co., Case No. 150-C-1970, having been decided by the Appeal Section on February 21, 1921, allowing certain items and denying other items of the claim, from which decision claimant appealed to the Secretary of War; and on April 5, 1921, an order was issued by said Secretary of War affirming the decision of the Appeal Section, and directing that unless said decision be accepted on or before April 15, 1921, a final order denying all relief so far as the War Department is concerned, be issued in the case; on April 15, 1921, the Assistant Secretary of War granted claimant an extension of time until April 21, 1921, to accept said decision; claimant having failed to comply with said direction, therefore, in accordance with the order of the Secretary of War, dated April 5, 1921, this final order is entered denying all relief from the War Department.

GEO. L. McKEEBY,
Lieut. Col., J. A., Chairman.
E. E. FUSSELL,
Recorder.

APRIL 6, 1921.

Case No. 3053.

In re **CLAIM OF HARRY F. HANN.**

The Appeal Section, War Department Claims Board, on February 25, 1921, rendered decision granting claimant partial relief. On appeal to the Secretary of War, affirmed. (See Vol. VIII, these decisions, p. 648.)

ON APPEAL BEFORE THE SECRETARY OF WAR.

Upon consideration of the record in the above-entitled case, the decision of the Appeal Section, War Department Claims Board, is affirmed.

JOHN W. WEEKS,
Secretary of War.

APRIL 13, 1921.

Case No. 3054.

***In re* CLAIM OF THE AMERICAN PROPELLER & MANUFACTURING CO.**

1. **CONTRACTS.**—A settlement agreement entered into subsequent to November 11, 1918, and not complying with the formalities required by section 3744, R. S., is not a binding obligation upon the United States.
2. **FACILITIES.**—Unless especially provided in the contract, or the necessity thereof contemplated at the time the contract was made and their cost included in the contractor's estimate of cost, there can be no recovery for the cost of special or increased facilities.
3. **CLAIM AND DECISION.**—Claim for \$439,529.38 under the act of March 2, 1919, and G. O. 103. Informal agreement found for the manufacture of 750 combat blocks; informal agreement for certain facilities denied, and under five formal contracts certain items allowed in settlement and others denied.

Maj. Hill writing the opinion of the Board.

This claim is before this Section on appeal from a decision of the Air Service Section making an award in the sum of \$181,467.66. The claim as originally filed was for \$439,529.38. Claimant filed an amended claim before the Air Service Claims Board for the sum of \$498,866.43. The claim is based upon five formal contracts with the Air Service for the manufacture of airplane propellers, upon an alleged informal agreement with Lieut. E. L. Ryerson, of the Air Service, for 1,000 propellers, and upon an alleged informal agreement with Lieut. E. L. Ryerson, Air Service, for the building of a second and third story upon claimant's new propeller factory on the Key Highway, Baltimore, Md. Claimant bases its claim for the specific amount asked in the amended claim upon an informal "settlement agreement" entered into between Mr. W. C. Potter, acting director of Aircraft Production, and Lieut. Col. A. C. Downey, Air Service, and claimant, in November, 1918, subsequent to November 11.

FINDINGS OF FACT.

1. Under date of September 25, 1917, the Signal Corps entered into formal contract No. 1750 with claimant, approved October 1, 1917, for the material described in order No. 20005. This order, dated September 21, 1917, was for 1,000 propellers of oak with copper tips, including box for Curtiss OX-5 engines, at \$87.65 each, \$87,650, delivery 20 per day commencing September 10, 1917.

2. Under date of October 6, 1917, the Signal Corps entered into formal contract No. 1846 with claimant, approved October 16, 1917, for the material described in order No. 20054. This order, dated October 4, 1917, covered item 1, 1,000 propellers, oak, copper tipped, including box for Curtiss OX-5 engine, at \$87.65 each, \$87,650; item 2, 1,000 propellers, oak, copper tipped, including box for Hall-Scott No. A-7-A engine, at \$87.65 each, \$87,650, a total of \$175,300, delivery on each item to be at the rate of 125 per month, beginning November 1, 1917.

3. Under date of March 25, 1918, the Signal Corps entered into formal contract No. 3347 with claimant, approved April 9, 1918, for the material described in order No. 20859. This order, dated March 22, 1918, was for 100 propellers, copper tipped, for Curtiss V-2, type 3 on R-4 airplanes, including box, at \$127 each, \$12,700, delivery to begin April 1, 1918, and the entire order to be completed May 1, 1918.

4. Under date of March 25, 1918, the Signal Corps entered into formal contract No. 3349 with claimant, approved April 9, 1918, for the material described in order No. 20860. This order, dated March 23, 1918, was for 500 propellers of oak, tipped with copper, including box for Curtiss OX-5 engines, at \$76 each, \$38,000.

5. Under date of May 16, 1918, the Signal Corps entered into formal contract No. 3870 with claimant, approved May 28, 1918, for material described in order No. D. O. 21128. This order, dated May 14, 1918, was for 3,000 propellers for U. S. 12 engines to be made of walnut in the "Charavay" design at \$100 each, \$300,000, delivery to begin June 15, and to continue at the rate of 40 per day, and completed by September 15, 1918.

6. These formal contracts were all on what was known as the Signal Corps short form No. 13, and contained no clauses as to facilities or as to cancellation.

7. Claimant's president, Mr. Spencer Heath, testified that in the latter part of February, 1918, he was verbally instructed by Lieut. E. L. Ryerson, Air Service, in charge of production and procurement of propellers for the Signal Corps, to proceed with the manufacture of 750 combat propellers, to be made of quartered oak in accordance with a design of Mr. Heath's, and that a few days later Lieut. Ryerson, by telephone, increased this order to 1,000 propellers. Lieut. Ryerson testified that some time early in March, 1918, he verbally instructed claimant to proceed with the manufacture of 750 combat blocks of claimant's Dynopter type design and that when an acceptable design should be reached instructions would be given to proceed with the making of these blocks into finished propellers. Under date of March 13, 1918, Lieut. Ryerson telegraphed claimant

to "discontinue manufacturing combat blocks." On March 14, 1918, Lieut. Ryerson wrote claimant, in part as follows:

"Confirming our understanding with you that you were to proceed with the gluing up of blocks for use on Combat propellers * * *. It was understood that mahogany or oak would be used, mahogany being given the preference, and used as far as possible with the stocks available. * * *. The arrangement was made with the understanding that you were to produce 750 propellers in March provided final information with regard to pitch and design could be obtained in sufficient time to permit the finishing of these blocks within the time specified."

8. At the time claimant received the telegram of March 13, it had in process, up to the stage of being glued as such, 184 blocks. Claimant did no more work upon these blocks and makes no claim thereon beyond the 184 blocks. A formal contract No. 4578, dated August 29, 1918, signed on behalf of the Air Service, for the material covered by order No. 720376, was forwarded to claimant. This order, dated August 26, 1918, was for 184 propellers for D. H. 4 planes with U. S. 12 engines, of white oak or mahogany, boxed, at \$150 each, \$27,600. Claimant declined to sign this contract, stating that the contract required the observance of certain processes of manufacture which had never formed any part of the agreement under which the work had been carried on and which had not been followed in the manufacture to the then state of completion.

9. On or about May 16, 1918, claimant was instructed to delay production under the four formal contracts for training propellers Nos: 1750, 1846, 3347, and 3349, and to extend the deliveries for approximately four months. In July, 1918, difficulties had arisen over the proper conditioning of material in process, and on August 2, 1918, claimant was instructed to stop all gluing operations on contract No. 3870 (order No. 21128). At this time differences arose between claimant and the Inspection Department as to the furnishing by claimant of proper equipment for use by the Government inspectors. Under date of August 26, 1918, claimant was instructed by telegram from the Production Department to hold all production on order No. 21128. No substantial amount of work was done by claimant on any of its contracts after this date. The five formal contracts called for 6,600 propellers, at an aggregate price of \$619,650. A total number of 2,493 propellers had then been shipped, on which claimant had received payment in the sum of \$201,731.20. Shipments under the different contracts had been as follows:

Under No. 1750—901 of the 1,000 contracted for;

Under No. 1846—906 of the 2,000 contracted for;

Under No. 3347—90 of the 100 contracted for;

Under No. 3349—379 of the 500 contracted for;

Under No. 3870—217 of the 3,000 contracted for;
of which 102 applying on contract No. 3870 were later rejected by the Government.

10. In October, 1918, conferences were had between claimant and Lieut. Col. Downey, contracting officer in the Air Service, with a view of arriving at a settlement of the existing difficulties relative to contract No. 3870 (order No. D. O. 21128). At a conference November 13, 1918, between Mr. Heath and his counsel, Mr. W. C. Potter and Lieut. Col. Downey, a proposition was made by Mr. Potter to Mr. Heath looking to a settlement of the five formal contracts. On November 14, claimant wrote Mr. Potter as follows:

“Referring to the conference at your office yesterday in regard to this company’s uncompleted contracts we wish to confirm our understanding of the verbal proposition made to us and our attorneys by you after separate conference with Lt. Col. Downey. We understand your proposition to be as follows:

“The item of \$10,200 on order #21128 for Charavay Propellers last shipped is to be deferred pending advice to you from your Engineering Department as to whether these propellers embody any departures of design which would render them less serviceable for use than propellers as to which no departures from the design is alleged.

“As to all completed and uncompleted work on orders other than the item on No. 21128 above referred to we understand that it is your proposition that we should be paid for all work as it now stands on a basis of cost of materials all direct and indirect labor costs all overhead charges direct and indirect covering the entire period since the beginning of the work on the material and 10% profit on the costs so obtained in connection with the work which was supplied by the Government and not paid for by us.”

Lieut. Col. Downey’s reply to this letter on November 19th is as follows:

“1. This will acknowledge receipt of your communication of the 14th instant in which you confirm your understanding of verbal proposition made to you by Mr. Potter and the undersigned at our recent conference.

“2. Your letter is in exact accord with the arrangements made at said conference and is confirmed subject to the one qualification that the overhead shall be the proportionate part of the overhead properly chargeable to the work being done with the Bureau of Aircraft Production.

“By direction of the Director of Aircraft Production.”

Claimant then wrote a letter dated November 22, 1918:

“Replying to your letter of the 19th we beg to advise that we have decided to accept the verbal proposition of Mr. Potter, as confirmed by us in our letter of the 14th inst., and your acknowledgement as above.”

Claimant also wrote letter dated November 25, 1918, to Lieut. Col. Downey, as follows:

"Referring to our letter of November 22nd, accepting Mr. Potter's proposition for payment for work done on our various contracts, we wish to confirm our understanding that the provisions in the third paragraph in our letter of November 14th are intended to apply to all completed and uncompleted work except the item of \$10,200.00 mentioned in the second paragraph in our letter of November 14th.

"In the second line of the third paragraph of our letter of the 14th, after the word "than" the words "*the item on*" were omitted by us inadvertently."

The letter was presented in person by Mr. Heath to Lieut. Col. Downey, who, at Mr. Heath's request, wrote in pencil at the bottom of the letter "O. K., A. C. Downey."

11. It is claimant's contention that these letters constitute a "settlement agreement" binding upon the United States. Claimant's claim sets up this "Potter-Downey settlement agreement" as the basis for the settlement of both the formal and informal contracts, but claimant's counsel stated at the hearing that it was their contention that it constituted a binding agreement only as to the five formal contracts.

12. In addition to the six contracts, five formal and one informal, for the production of propellers, claimant alleges an informal agreement by Lieut. E. L. Ryerson, A. S., for the construction by claimant of a second and third story upon its new one-story factory which it was then building on the Key Highway. In December of 1917 claimant company was occupying leased premises in the city of Baltimore, which claimant states were more than adequate to perform all of its contracts then on its books. Claimant, in November, 1917, started the construction of a new one-story and basement building on the Key Highway "on general anticipation and demand and not for the purpose of carrying out any of the contracts that we then had."

"It was a venture based on expectation of greatly increased demand for our product."

13. Mr. Heath testified that in the latter part of December, 1917, Lieut. Ryerson, while inspecting the work on the new building, inquired whether the building could be increased in height; that he stated to Lieut. Ryerson that the building was so designed as to permit the addition of a second story, and that the roof was made sufficiently strong and so constructed as to become the floor of the second story; that Lieut. Ryerson stated that the building would be insufficient for the needs of his office, and asked Mr. Heath to increase the building by another story and an office story, together with the necessary facilities (boilers, elevators, etc.) for making the factory twice as large, and stated that he would "keep claimant

company going to the limit in the production of combat propellers;” that upon Mr. Heath’s objection that it was not sufficient to say that they would be kept going, but that claimant needed the contracts, Lieut. Ryerson stated that he would see that claimant got the contracts; that he wanted the building put up, and exacted a promise from Mr. Heath to put up the extra story on the building; and that in accordance with instructions given the next day by Mr. Heath to the builder an entire second story, and a third story covering a portion of the space, was built.

14. Lieut. Ryerson, at the hearing, denied that he had ever given any instructions to increase the size of the building; that he had ever asked Mr. Heath to promise to build an additional story; that he had ever told Mr. Heath that if Mr. Heath would build the additional stories he would keep his plant going with contracts for combat propellers; or that he had ever promised claimant contracts in consideration of the furnishing of any additional facilities by claimant. Lieut. Ryerson did testify that he visited claimant’s plant in late December of 1917 or early in January, 1918, to see what claimant was doing with regard to production of propellers then on order and to see what claimant’s facilities were.

15. In August, 1919, Mr. Charles H. Bent, an accountant in the Air Service, went to claimant’s factory with a force of accountants and inspectors to make an audit of this claim as originally filed. Mr. Heath stated to Mr. Bent that claimant had no cost records prior to August, 1918, and therefore none covering the active operations in making propellers under these contracts. Mr. Bent suggested the making of a number of propellers in order that the cost of material and of the various operations could be determined. Mr. Heath thereupon ordered the making of a test run of 12 propellers of pattern 130. An accurate record of material and of labor upon all operations was made by the Government accountants, so that the cost of the propeller in all stages of completion was determined. From this record the cost of other patterns was arrived at by computation.

16. The lack of cost records made it impossible to determine the proper figure of overhead to be applied to the direct labor expended during the performance of the contracts. At the conference between Mr. Heath and Mr. Potter and Lieut. Col. Downey, in November, 1918, it was agreed that an average of the overhead for the first three months for which records were available, namely, August, September, and October, 1918, should be taken and applied as actual overhead during the performance of the contracts. In presenting its claim claimant used these months and stated the average overhead to be 120 per cent. The Government accountants, from their examination of claimant’s records, found the average overhead for these three months to be 86.014 per cent. The principal eliminations made from claim-

ant's items were for amortization of patents, donations, excess insurance, interest, excess amounts for taxes, and excess amounts for operating, maintenance, and general expense. Some of these items were eliminated because they were not proper charges against Government contracts and others because they were not properly supported as chargeable against the manufacture of the propellers.

17. Such further facts as may appear necessary as to each of the 15 schedules of the claim will be stated in the decision as each schedule is discussed.

DECISION.

1. Upon the first consideration by the Air Service Claims Board, claimant was denied all relief on the ground of its default in deliveries as scheduled. After a hearing, the Air Service Station reconsidered its decision and made an award upon the merits of the claim. There is no question but that claimant was in default in delivery under all the formal contracts. There is, however, much doubt as to the liability for the default and whether or not such default was excusable due to actions on the part of the Government. This Section is not prepared to disturb the action of the Air Service Section in its finding that the default was excusable and in its making of an award upon the merits of the claim.

2. It is the opinion of this Section that the so-called "Potter-Downey settlement agreement," which provides that claimant's formal contracts should be cancelled by payment to claimant of the amount expended by it in performance of these contracts plus a profit of 10 per cent, is not binding upon the United States. The agreement cannot be held good as coming within the provisions of the act of March 2, 1919, because the agreement was not made until after November 11, 1918, and furthermore because the expenditures for which reimbursement is claimed were made prior to the date of that agreement, and therefore not upon the faith of the agreement. This agreement is not otherwise binding upon the United States because it was not reduced to writing and signed at the end thereof by the parties within the requirements of section 3744, Revised Statutes. Nor does it appear that a settlement on the basis of that agreement as set up by this claim for \$498,866.43 is in the interest of the United States. Claimant's contention that a "settlement contract" does not require the formalities prescribed by section 3744 is, in our opinion, without merit.

3. This Section is of the opinion that claimant has not proved the existence of the alleged informal agreement for building a second and third story with the necessary additional boiler capacity, elevators, etc., upon the one-story and basement building which it was constructing on the Key Highway. Lieut. E. L. Ryerson, A. S., upon

whose statements alone the agreement is alleged to be founded on the part of the United States, categorically denies making the statements attributed to him by Mr. Heath, and testifies that he neither made any agreement with claimant nor gave any instructions to claimant to increase the size of the new building on the Key Highway.

4. This Section finds that an informal agreement was entered into the latter part of February, 1918, between the Signal Corps, represented by Lieut. E. L. Ryerson, A. S., and claimant, for the manufacture of 750 combat blocks which were later to be completed into propellers upon the adoption of a satisfactory design. Claimant limits its claim upon this agreement to 184 combat blocks, and this was the number stated in the formal contract later tendered to but not signed by claimant. Claimant included this number in its inventory of propellers in schedule 1. The amount to which claimant is entitled under this agreement will be included in this decision under the allowance in schedule 1.

Schedule 1.

5. This schedule, covering finished and partly finished propellers and laminations and cut copper tips in the original claim, was for \$135,066.57, in the amended claim for \$141,007.94, and was allowed by the Air Service Section to the amount of \$37,306.25. The cut copper tips are not included in the Air Service allowance on this schedule and are included and will be here treated under schedule 5, where they were placed in the claim as originally filed. To arrive at the figures claimed, claimant sets up the total number of propellers on hand in all stages of completion at 2,694, and the total number of laminations (parts of propellers) at 4,816, figures the amount of material and labor, adds to the labor item 120 per cent as overhead, and to the total cost thus found adds 10 per cent for profit in accordance with the so-called "Potter-Downey settlement agreement."

6. It will be noted that in the absence of cost records covering the period of manufacture of these propellers it was necessary to arrive at what amounts to a negotiated figure for the cost of production and the overhead expense. It is believed that the cost figures obtained from the test run of 12 propellers and the overhead figure of 86.014 per cent, as found by the Government accountants as furnished for the three months taken, are substantially fair both to the Government and claimant and are proper figures upon which settlement may be based.

7. At the same time that the inventory was made by the Government the propellers and laminations were subjected to the same inspection by a Government inspector as would have been made dur-

ing the manufacture and before acceptance of the propellers. This inspection resulted in the rejection of a large number of propellers and laminations. While it is true that this inspection was made in August, 1919, approximately a year after their manufacture, it is our opinion that a claimant is entitled to payment in settlement under the provisions of Supply Circular No. 111 only for such material as the inspection determined would have been accepted during performance of the contract. This inventory and inspection of material under the five formal contracts found 535 acceptable propellers and 2,732 acceptable laminations. The completed propellers are included at the contract price. The incomplete propellers and laminations are figured at their cost to their respective stages of completion, in accordance with the cost as ascertained from the test run of 12 propellers; with overhead on direct labor added at 86.014 per cent, plus the sum of 10 per cent allowable under Supply Circular 111 on material in process, making a total allowance of \$37,506.24 as found by the Government accountants and allowed by the Air Service Section. This allowance on Schedule 1 as to the five formal contracts is approved and affirmed by this Section. To include all propellers and laminations included by claimant in Schedule 1 there should be added the 68 propellers and 59 laminations found acceptable by a similar inventory and inspection of material produced under the informal agreement with Lieut. Ryerson found above by this Section (unsigned contract No. 4578).

This Section finds that claimant is entitled, on the same basis as above, to payment for this material in the sum of \$3,208.68 under the informal agreement as found above, in addition to the sum of \$37,306.25 on the five formal contracts, making a total of \$40,514.93.

Schedule 2.

8. This schedule, covering walnut lumber in the original claim, was for \$141,240.19, in the amended claim for \$141,745.28, and was allowed by the Air Service Section in the amount of \$129,053.61.

9. The first item of Schedule 1 is for the cost to claimant of walnut lumber taken back by the Government. This lumber was sold by the Government to claimant for use in making propellers. After work had ceased the Government desired to take back this lumber, which action was agreeable to claimant. Upon the physical inventory of this lumber by the Government at claimant's yard the quantity was found to be 382,574 feet. There should be added to this amount 3,194 feet removed by the Government before the inventory was made, making a total of 385,768 feet. In order to secure the average price paid by claimant for this lumber the Government accountants took from the invoices covering the last deliveries to that amount

and found the average price to be \$329.45 per M feet. Claimant, taking the price from unpaid invoices aggregating \$330,000, which includes the invoices covering the above 385,768 feet, stated the average price to be \$329.60.

It is our opinion that claimant is entitled to payment at the average price of the lumber last delivered and is therefore entitled to payment for 385,768 feet at \$329.45 per M feet, a total of \$127,091.26. It does not appear whether or not claimant has actually made payment for the walnut lumber to the Government. If payment has been made, claimant is further allowed, under Supply Circular No. 111, as compensation for capital invested in raw material, 6 per cent per annum upon the amount paid for the walnut lumber.

10. The second item is for storage expenses on this walnut lumber. As to the labor portion of this expense, the Government accountants reduced claimant's figures to \$1,147.72, which amount was conceded by claimant's counsel at the hearing, and is allowed in that amount. As to materials, claimant seeks payment for foundation timbers, 2,026 feet at \$50 per M feet, \$101.30; for piling sticks, 27,630 sticks at \$17.16 per M sticks, \$474.23; and for cover boards, 11,400 feet at \$37 per M feet, \$421.80, all of which material is claimed to have been provided and used in connection with the storing of the walnut lumber. In the original claim these quantities were estimated. In the amended claim, although the quantities are set at definite figures, it does not appear from the testimony that the figures are anything but estimates. It does not appear that these materials were now or purchased specifically for this particular work. The Government accountants inventoried the quantities actually found where the lumber had been stored, and allowed 2,000 piling sticks at \$8.50 per M, the price set in the original claim and verified from the company's records, 3,436 feet of cover board and 1,000 feet of foundation timbers at \$10 per M, the then estimated value \$20, making a total of \$61.36.

While this item is uncertain, we do not find evidence justifying the allowance of any amount in excess of \$61.36.

11. The third item is for kiln drying of 118,000 of the 385,768 feet taken back by the Government. Claimant has charged \$17.33 per M feet for labor, plus overhead at 120 per cent, a total of \$4,498.87. Under claimant's bookkeeping system all cost of kiln operations was charged to overhead. In reaching the average overhead for August, September, and October, all cost of kiln operations found were included by the Government accountants in reaching the figure of 86.014 per cent, which was the figure found and applied to actual operations under this contract because of the absence of any cost records for the actual period of such operations. It is, therefore,

our opinion that this item was properly disallowed, and its disallowance is affirmed.

12. The fourth item is for dressing 87,709 feet of walnut lumber at \$5 per M feet, \$438.55. This item was not contained in the original claim, and therefore was not passed upon by the accountants nor by the Air Service Section. It appears that among the 385,768 feet taken back, the Government checkers noted 87,709 feet as dressed. Claimant now states that this amount was dressed by it preparatory to use in the making of propellers. Claimant was unable to state the actual cost of dressing, but did state that similar work was done for it at a cost of \$5 per M feet. It is our opinion that claimant should be allowed the full amount of this item at \$438.55.

13. The fifth item is for fire insurance carried on 382,574 feet of walnut lumber for nine months, to August 21, 1919, the date of removal by the Government, at \$1.672 per \$100 of valuation per year. The computation thereon by the Government accountants of \$1,580.53, as allowed by the Air Service Section, is in substantial agreement with the amount claimed, and the allowance of that amount is affirmed.

14. The sixth item is for storage for nine months, to August 21, 1919, the date of removal, of 382,574 feet at 75 cents per M feet per month, \$2,582.37. Claimant bases the charge of 75 cents on the then current reasonable rate in Baltimore for such storage. The Government accountants took the actual area occupied by this lumber on the lot leased by claimant, prorated the rental paid to this actual area occupied, and found \$25 per month, or \$225, as the actual expense to claimant. It is our opinion that the actual cost to claimant, and not the rate which claimant would have paid to another, is the proper basis for the charge. The allowance of \$225 is therefore approved and affirmed.

15. The allowance by the Air Service Section of \$1,143.64 paid by claimant in furnishing labor to assist Government officials, at their request, in making in April, 1919, the inventory of walnut lumber contained in this schedule and \$114.35 as compensation for office and administration expense thereon, a total of \$1,257.99, is approved and affirmed.

Schedule 3.

16. This schedule, covering boxes purchased by claimant for use in the shipment of propellers under these contracts and remaining on hand and for insurance and storage on same, in the original claim was for \$5,343.31, in the amended claim \$6,968.31, and was allowed by the Air Service Section to the extent of \$5,756.56.

17. The first item of 445 boxes at, for single propellers, \$5.25 each, \$2,336.25, was found correct upon the Government inventory and is allowed in full.

18. The second item is for 722 boxes for single propellers at \$4.50 each, \$3,249. Considerable discussion was had at the hearing as to a deduction from the invoice price paid by claimant in cases where the boxes had been weathered from storage in the open. It appears from inspection of the inventory that no deduction was made because a box was inventoried as weather-beaten. If a box was complete it was inventoried at the invoice price; if rope handles were missing a deduction of 25 cents was made; and if the cover was missing a deduction of \$1.50 was made. Of this item 88 boxes were inventoried as complete and allowed at the invoice price of \$4.50; 605 were inventoried as without rope handles and allowed at \$4.25 each; and 9 were inventoried as with no covers and allowed at \$3 each.

19. The third item is for 18 large boxes holding 6 propellers each, at \$12 per box. The inventory revealed 22 boxes, of which 21 were complete and allowed at the invoice price of \$12, and 1 inventoried as without cover and allowed at \$8.

20. The total allowance under the three items for boxes, of \$5,590.50, by the Air Service Section is approved and affirmed.

21. The fourth item is for insurance on these boxes. Insurance was allowed in the amount of \$101.26 at the rate claimed, \$1.672 per \$100 valuation for 13 months, November 21, 1918, to December 21, 1919, on total allowance of \$5,590.50 for boxes. This allowance covering the period named is approved and affirmed.

22. The fifth item is for storage on this material in the open at \$20 per month. The allowance of \$65 by the Air Service Section at the rate of \$5 per month computed on the area occupied upon the basis of the rental in claimant's lease, for the period November 21, 1918, to December 21, 1919, is approved and affirmed.

23. The total allowance on this schedule by the Air Service Section of \$5,756.76 is approved and affirmed. This Section finds, however, that claimant is further entitled to, and will be allowed, from December 21, 1919, to date of settlement contract, under the fourth item, insurance at the rate of \$1.672 per \$100 valuation per year on a valuation of \$5,590.50 and under the fifth item for storage at the rate of \$5 per month.

Schedule 4.

24. Schedule 4, covering loss by cancellation of subcontract with the Security Storage & Trust Co. for packing propellers on contract No. 3890, in the original claim was for \$1,802.56, in the amended claim \$1,911.88, and was allowed by the Air Service Section to the amount of \$177.42. Claimant presented no competent proof of pay-

ment in cancellation of this contract. Except as to the amount allowed by the Air Service Section, either the claimant or its subcontractor had disposed of the material upon which an allowance for loss was asked. Mr. Bent, the Government accountant, testified that he noted that the memorandum presented to him largely in support of this schedule had some reference to the Navy. He took the matter up with claimant's vice president, Mr. Moore, and was informed by Mr. Moore that most of the claim under this schedule had reference to boxing for Navy contracts. It is therefore our opinion that claimant is entitled to payment only for such material as was presented for inventory—namely, nine boxes at \$12 each and five boxes at \$8, \$148, plus \$29.42 for felt paper, after deduction of salvage at 50 per cent because the paper was retained by claimant, making a total amount of \$177.42. The allowance of this amount by the Air Service Section is approved and affirmed.

Schedule 5.

25. This schedule, covering loss on cut copper tips, sheet copper, and copper rivets, in the original claim was for \$1,395.73, in the amended claim for \$2,004.53, and was allowed by the Air Service Section in the amount of \$752.15.

26. The first item is for cut copper tips. The inventory found 1,090 tips, as claimed, but weighing 483½ pounds instead of the 491 pounds claimed. Allowance was made by the Air Service Section at the invoice price and for the labor cost of making as determined by the test run plus overhead on the labor at 86.014 per cent and plus 10 per cent allowable under Supply Circular No. 111 for material in process, a total of \$400. The allowance of the amount of this item is approved and affirmed.

27. The second item is for loss on sheet copper on hand purchased for tipping propellers, 3,336½ pounds at \$0.41, \$1,367.97, and for 470 pounds at \$0.42, \$197.40, a total of 3,806½ pounds, costing \$1,565.37. In its original claim the amount stated was 4,714 pounds at a total cost of \$2,224.62, of which 2,059 pounds were at \$0.342 and 2,655 pounds at \$0.38. The Government inventory revealed 3,810 pounds of sheet copper at an invoice cost of \$0.345 per pound, of which but 2,435 pounds were required to complete the contracts, making a total allowance of \$840.48 by the Air Service Section. It is our opinion that there should be added thereto under Supply Circular No. 111 as compensation for capital invested, 6 per cent on \$840.48, from the date of the invoice, May 16, 1918, to the date of settlement contract.

28. The third item is for 500 pounds copper rivets at \$0.42 per pound. These rivets were purchased for use in fastening the copper to the propeller blades. The Government accountants found that 500

pounds were on hand, and that the cost was \$0.42 per pound. Inasmuch as but 152 pounds were necessary to complete the contract, this item was allowed to the extent of 152 pounds at \$0.42 each, \$63.84. This allowance is approved and affirmed.

29. The fourth item is for the cost of fire insurance on this material. The allowance of \$23.62 at the rate claimed, \$1.672 per \$100 valuation per year, but on valuation of \$1,303.92, for the period November 21, 1918, to December 21, 1919, is approved and affirmed. Claimant, however, is entitled to, and there will be added to this amount, the cost of this insurance at the above rate and the above valuation from December 21, 1919, to date of settlement contract.

30. It appears from the record that the rate per pound of a salvage value on the scrap and sheet copper and copper rivets as listed above was agreed upon by claimant and the accountants and approved by the Air Service Section, amounting, for the poundage found above, to the sum of \$573.39. If this material is retained by claimant, deduction will be made in that amount from the allowances above made on this schedule.

Schedule 6.

31. This schedule, covering "continued overhead expense" in the original claim, was for \$68,890, in the amended claim \$84,365.41, and was entirely disallowed by the Air Service Section.

32. Claimant has taken what it alleges is the overhead expense at 120 per cent on each propeller pattern, and by dividing that expense by the number of days upon which work was performed on that pattern, has found what it terms the average overhead expense per day. It has then applied that average overhead expense per day to the number of days between the date upon which it ceased work on that pattern and November 20, the date on which it alleges the so-called "Potter-Downey agreement" became effective. There is then added 10 per cent, to which claimant alleges it is entitled under the so-called "Potter-Downey agreement." Claimant seeks to apply its overhead expense to a period when it admittedly performed no direct labor upon the various Air Service patterns. Claimant's president, Mr. Heath, admitted, under cross-examination, that in July, 1918, it entered upon production under Navy contracts which it fully performed to the amount of more than \$1,000,000. Mr. Heath also testified that in the performance of these Navy contracts claimant received payments, including payment for overhead, at the rate of 209 per cent and 220 per cent.

33. It is our opinion that claimant has failed to substantiate its right to any payment under this schedule, and the disallowance of this schedule by the Air Service Section is approved and affirmed.

Schedule 7.

34. This schedule, covering storage and insurance on the inventory of finished and unfinished propellers contained in Schedule 1, in the original claim, was for \$1,720.87, in the amended claim for \$8,225.90, and allowed by the Air Service Section covering the period November 21, 1918, to June 21, 1920, in the sum of \$7,163.48.

35. The first item is for rent of the building in which the finished and unfinished propellers were stored. Claimant states that the rental of this entire three-storied building was \$83.34 per month and that the propellers occupied only the third floor. Upon the Government's inspection only 30 per cent of this material was accepted. It is our opinion that the accepted material should bear 30 per cent of the rental of the third floor. Accepting the rent of the third floor as one-third of the rent of the entire building and taking 30 per cent thereof to cover the accepted proportion of the material cost, \$8.33 per month, properly chargeable to the accepted material, this amounts to \$158.34 for 19 months from November 21, 1918, to June 21, 1920.

36. The second item of \$30, for hauling propellers to the storage building, and the third item of \$144, for handling on this transfer, are allowed as claimed.

37. The fourth item for watchmen at this building from November 21, 1918, to September 20, 1919, two men at \$3.15 each per day, \$1,915.20, and for the partial time of one man, 1½ hours per day from September 21, 1919, to June 21, 1920, 275 days at 55 cents per hour, \$226.60, making a total of \$2,141.80, is allowed as claimed. Claimant's counsel stated at the hearing that there was no claim beyond June 21, 1920, on this item.

38. The fifth item is for \$3,397.01 for insurance from November 21, 1918, to June 21, 1920, 19 months at \$1.672 per year on \$100 valuation, on the inventory of finished and unfinished propellers on hand as claimed in Schedule 1, valued at \$128,189.06. Under Schedule 1 claimant has been allowed the sum of \$37,306.25 for finished and unfinished propellers on hand under the five normal contracts and \$3,208.68 under the informal contract, a total of \$40,514.93. Claimant is entitled to payment at the rate claimed, \$1.672 per year per \$100 valuation on this amount of \$40,514.93 for the 19 months to June 21, 1920, in the sum of \$1,072.56.

39. The allowance of the Air Service Section under this schedule of \$7,163.48 is disapproved, and there is allowed under this schedule the sum of \$3,546.70, to which there will be added from June 21, 1920, to the date of settlement contract under item 1, rental at the rate of \$8.33 per month, and under item 5, insurance on material valued at \$40,514.93, at the rate of \$1.672 per year per \$100 valuation.

Schedule 8.

40. In the original claim this schedule was for \$19,657, in the amended claim it was for \$35,754.03, and was entirely disallowed by the Air Service Section. At the hearing before this Section claimant's counsel stated that because of an error in stating certain items the schedule should be reduced to \$34,306.55. This schedule is a statement of the alleged excess cost (the cost in excess of the amount for which it was later sold) of the second and third stories of the new Key Highway building, and the liability of the United States therefor is based on the alleged agreement with Lieut. Ryerson for the erection of these additional stories.

41. Inasmuch as this Section has denied the existence of the alleged Ryerson agreement for the two new stories and equipment on this building, it follows that this schedule is disallowed in its entirety.

Schedules 9 to 15, inclusive.

42. These schedules cover facilities provided by claimant, as it alleges, for the purpose of expediting production of propellers under its contracts with the Signal Corps. These schedules in the original claim are for \$63,354.52, in the amended claim for \$76,883.15, and were entirely disallowed by the Air Service Section.

43. The formal contracts contain no clause obligating the Government to recompense claimant in any manner for additional or special facilities, nor is there any provision at all for the furnishing by claimant of further facilities. In the absence of any such clause it must be presumed that claimant had sufficient facilities to complete the performance within the time specified. Claimant places great stress on its statement that these facilities were necessary and were required to complete and expedite production under the contracts, but in this connection it must be noted that at no time were claimant's deliveries under the contracts keeping up with the stipulated schedules.

44. It is difficult in this case to arrive at an exact understanding as to the reasons for the furnishing of these various facilities with which claimant provided itself. Claimant certainly planned the installation of some machinery in the new one-storied factory on the Key Highway, which it states was built upon general anticipation. The same is true as to facilities for the second story, which we have found was not built in pursuance of any agreement obligating the Government to pay therefor. Where facilities used in the performance of a Government contract are acquired subsequent to the date of the contract, but in pursuance of a plan for extension of contractor's plant not made in contemplation of any specific Government contract and not taken into consideration in the bid therefor, no amorti-

zation of the cost of such facilities through Government contracts subsequently awarded can be allowed.

45. Claimant's president, Mr. Heath, has testified generally that the facilities were contemplated when the various contracts were made and the cost thereof taken into account in the unit prices submitted. There has been no satisfactory evidence offered as to the inclusion in the unit price on any contract of any specific amounts for any specific facility items. There has been no testimony as to negotiations covering the prices at which the contracts were let, nor any testimony of specific or detailed estimates made by claimant as the basis for any such prices.

46. If special facilities necessary for the performance of these contracts had been contemplated as necessary for the particular contract and had been included in the estimate of cost at the time the contract was made, and the facilities were actually procured in good faith for the purpose intended, it is our opinion that claimant could properly be reimbursed for the unamortized portion of the cost of such facilities. It is our opinion, however, taking into consideration all of the testimony and documentary evidence available, that the evidence does not show that the facilities claimed in these schedules were so contemplated and so included in any detailed estimate of cost by claimant upon any of these contracts. The evidence submitted is furthermore not sufficient to establish any agreement, express or implied, by the terms of which the United States became obligated to reimburse claimant for the cost of facilities covered by these schedules.

47. For the reasons above stated, it is the opinion of this Section that these Schedules 9 to 15, inclusive, were properly disallowed by the Air Service Section, and such disallowance is approved and affirmed.

DISPOSITION.

1. This Section will make a statement of the nature, terms, and conditions of the agreement for the manufacture of 750 combat blocks and will transmit same, together with Certificate Form "C" and a copy of this decision, to the Air Service Section for appropriate action thereon, and upon the balance of the claim, in accordance with this decision.

2. The amount to which claimant is entitled because of the agreement for the manufacture of 750 combat blocks is included in the amount to which claimant has been found to be entitled in this decision.

Lieut. Col. McKeeby and Lieut. Tabb concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

MAY 7, 1921.

Case No. 3054.

In re CLAIM OF THE AMERICAN PROPELLER CO.

ON APPEAL BEFORE THE SECRETARY OF WAR.

The Appeal Section, War Department Claims Board, on April 13, 1921, rendered decision granting claimant partial relief. On appeal to the Secretary of War, affirmed. (See Vol. VIII, these decisions, p. 743.)

Upon consideration of the appeal and record in the foregoing case the decision of the Appeal Section, War Department Claims Board, is affirmed.

JOHN W. WEEKS,
Secretary of War.

FINAL ORDER DENYING RELIEF.

The claim of the American Propeller & Manufacturing Company, case No. 150-C-3054, having been decided by the Appeal Section on April 13, 1921, allowing certain items and denying others items of the claim, from which decision claimant appealed to the Secretary of War; and on May 7, 1921, an order was issued by said Secretary of War affirming the decision of the Appeal Section; and on May 12, 1921, claimant was notified that it would be given 10 days to accept the decision of the Appeal Section as affirmed by the Secretary of War, or action would be taken in accordance with the resolution of the War Department Claims Board, passed January 7, 1921; claimant having received the above notice on May 13, 1921, and the 10 days having expired and no response having been received from claimant, therefore, by direction of the Assistant Secretary of War, this final order is entered denying all relief from the War Department.

GEO. L. McKEEBY,
Lieut. Colonel, J. A.,
Chairman.

E. E. FUSSELL,
Recorder.

MAY 26, 1921.

Case No. 3026.

In re **CLAIM OF NEW YORK AIR BRAKE CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

This claim was decided adversely to claimant by the Appeal Section, War Department Claims Board, on March 1, 1921. On appeal to Secretary of War, decision affirmed in part. (See Vol. VIII, p. 662.)

Upon consideration of the appeal and record in the above-entitled claim, I affirm the action of the Appeal Section, War Department Claims Board, with the exception of so much thereof as holds that contractor did not use his best endeavors in the performance of the contract, as I believe he did do so, and I direct that 7½ per cent be paid on this item.

JOHN W. WEEKS,
Secretary of War.

MAY 24, 1921.

Case No. 2099.

***In re* EMPLOYEES OF THE MINNEAPOLIS STEEL & MACHINERY CO.,
MINNEAPOLIS, MINN.**

DECISION OF THE SECRETARY OF WAR.

For all facts in this case, see Volume VI, page 835; Volume VIII, p. 66.

Upon consideration of the record in this case, including the memorandum dated May 17, 1921, from the office of the Judge Advocate General of the Army, the legal conclusions embodied in which have my approval, I am convinced that the Secretary of War is without authority to adjust or pay these claims. I therefore direct that the decision of the Board of Contract Adjustment, dated June 3, 1920, be set aside, and that the War Department Claims Board proceed no further with the work of the adjustment of these claims.

JOHN W. WEEKS,
Secretary of War.

MAY 17, 1921.

MEMORANDUM FOR THE SECRETARY OF WAR.

1. While certain workmen employed in Minneapolis by the Minneapolis Steel and Machinery Co. were engaged in the manufacture of products, including munitions, which were to be delivered by the Steel Co. to the War Department, the Navy Department, and the United States Shipping Board, and to various private concerns, these workmen, as they assert, entered into an informal contract with the United States, under the terms of which they were to be compensated by the United States in consideration of their continuing to work for the Steel Co. and not striking. Under date of November 30, 1920, your predecessor in office decided that they are entitled to compensation of this nature under the terms of the Dent Act, and he directed that steps be taken to settle and adjust the amounts to which the several claimants are entitled.

My opinion is asked as to whether the decision of November 30, 1920, is binding upon you and as to what steps ought now to be taken with reference to these claims, and a sketch of the present situation is desired.

2. It will be convenient, perhaps, to state my conclusions before explaining my reasons therefor or sketching the facts in greater detail. I am of opinion that you are not legally bound by the decision of November 30, 1920, for the reason that your predecessor was without power, authority, or jurisdiction to make any determination in respect to the alleged liability of the United States asserted by these workmen. My recommendation is that you disavow legal authority to adjust or pay the claims and that you cause no step to be taken toward the ascertainment of the several amounts claimed. I am also of opinion that the situation is one which merits the attention of the Congress in order that it may determine whether compensation shall be made to these claimants and, if so, how the several amounts to be paid shall be ascertained. Whatever treatment is accorded to these Minneapolis claimants should in my view also be accorded to the workmen employed in St. Paul by the American Hoist and Derrick Co. and by the St. Paul Foundry Co. The claims of the latter, although not expressly included in the decision of November 30, 1920, have been asserted in the same way and depend upon the same set of facts.

3. It may be regarded as a well-settled doctrine that considered decisions made with reference to claims against the United States by one of its officers are binding upon his successor in office, in the absence of fraud, of clerical mistake, of newly discovered facts, or of change of statute justly affecting the situation.

1912, J. A. G. Dig. p. 238.

United States v. Bank of Metropolis, 15 Pet. 377, 401.

Kendall v. Stokes, 3 How. 86, 98, 794.

Wis. C. Railroad v. United States, 164, U. S. 190, 205.

State of Maine v. United States, 36 Ct. Cls. 531, 553.

In re West. Pac. Railroad, 13 Ops. Atty. Gen. 387.

In re Redick McKee, 17 Ops. Atty. Gen. 315.

Even where the former decision is affected by legal error, its binding character has been generally admitted.

U. S. v. Bank of Metropolis, *supra*.

In re West. Pac. Railroad, *supra*.

In re West. & Atlantic Railroad, 16 Ops. Atty. Gen. 452.

Nevertheless, where an officer assumes to make a decision which, on the admitted facts, is beyond his legal authority to make, it is binding neither upon his successor nor upon anyone else.

1912, J. A. G. Dig. p. 239.

U. S. v. Bank of Metropolis, *supra*.

Rollins & Presbrey v. United States, 23 Ct. Cls. 123.

In re War Claim of Pennsylvania, 16 Ops. Atty. Gen. 489, 492.

In such event, it is believed to be good administration for the successor in office to make it clear by some official statement or by a

revocation of the decision that the latter will not be carried into effect.

Where the legal authority to make a decision depends upon the existence of a controverted fact, there is room for doubt as to whether a finding in favor of the existence of such jurisdictional fact, accompanied by a decision of the claim on the merits, makes the latter binding upon a successor in office. While I favor the view that such a decision would be binding, it will appear, I think, from the following statements of facts involved in these workmen's claims that the question suggested is not material to the conclusion.

My conclusion that the decision of your predecessor is not binding upon you is based upon the propositions (1) that power to make any decision under the Dent Act is, by its express terms, limited to the adjustment of agreements entered into with the agents of the President and of the Secretary of War, and (2) that, as a matter of legal interpretation of the presidential proclamation of April 8, 1918 (40 Stat. 1766), neither the War Labor Board nor Mr. Vernon J. Rose, its representative, who made the alleged agreement with the claimants, was an agent of the President or of the Secretary for the purpose of obligating the United States to compensate the workmen of the Steel Co. My conclusion does not involve, therefore, questioning any (jurisdictional or other) fact found by your predecessor.

4. The contracts with the Steel Co. which affect the War Department were made in 1917 and 1918 with the Ordnance Department and required the manufacture of munitions. These contracts were in part on a fixed-price basis and in part on a cost-plus basis. Contracts of the former sort contained, in general, a labor-dispute clause, reading as follows:

"Adjustment of Labor Disputes.—In the event that labor disputes shall arise directly affecting the performance of this contract and causing or likely to cause any delay in making the deliveries, and the Secretary of War or his representative shall have requested the contractor to submit such disputes for settlement, the contractor shall have the right to submit such disputes to the Secretary of War for settlement. The Secretary of War may thereupon settle or cause to be settled such disputes, and the parties hereto agree to accede to and to comply with all the terms of such settlement. If the contractor is thereby required to pay labor costs higher than those prevailing in the performance of this contract immediately prior to such settlement, the Secretary of War or such representative in making such settlement and as a part thereof may direct that a fair and just addition to the contract price shall be made therefor * * *. No claim for additional shall be made unless the increase was ordered in writing by the Secretary of War or his duly authorized representative and such addition to the contract price was directed as part of the settlement."

The cost-plus contracts contained the following provision:

"The contractor agrees that employees, skilled or unskilled, will be paid at rates not in excess of those paid or prevailing in the neighborhood of the contractor's plant unless the contractor is specifically authorized upon the written certificate of the contracting officer to pay greater rates."

The Steel Co., which was a long-established concern of high standing, largely increased its personnel to take care of its Government interests, and in the year 1918 90 per cent of its factory output was Government material. The company suffered no strikes among its employees at any time during the progress of its work under said contracts, and production was heavy and uninterrupted until stopped by the Government following the Armistice. It was aware of no discontent among its employees. Nevertheless, in the late spring or early summer of 1918 the representatives of a local labor union at Minneapolis, asserting that a labor controversy existed between the following companies and their employees—to wit, the Minneapolis Steel and Machinery Co., of Minneapolis; the St. Paul Foundry Co., of St. Paul; and the American Hoist and Derrick Co., of St. Louis—brought the alleged controversy to the notice of the National War Labor Board. On September 27, 1918, a formal complaint signed by the recording secretary, Local No. 59, business representative of District 77, and international representative, was filed with the War Labor Board, and on or about October 1, 1918, the Board sent its representative, Mr. Vernon J. Rose, to Minneapolis to investigate the situation in regard to the alleged unrest among the said employees. About the date mentioned and before November 11, 1918, Mr. Rose consulted with representatives and attorneys of the local labor union and made several speeches to the employees of said companies, including the Steel and Machinery Co. He stated in substance to such employees that if they would continue at work and submit their claims for increased wages and betterment of working conditions to the War Labor Board the Government would agree to enforce any award made by such Board and guarantee payment to such employees of any increase which by the Board's findings was found to be just and reasonable. The agreement on which the decision of November 30, 1920, is founded consists of the offer which these public speeches by Mr. Rose are regarded as having made and of the workmen's acceptance thereof, which acceptance is deduced from the fact that they remained at work and rendered loyal service.

When first brought to the attention of the Labor Board the controversy was not stated to have reference to wage schedules or general conditions of labor—the only charge made was one of discrimination against labor unions and union men. Claims for wage increases were presented subsequently. The Steel and Machinery Co.,

together with many, if not all, of the manufacturing plants in the Minneapolis and St. Paul districts, were open-shop plants at the beginning of the war and the Steel and Machinery Co. has continued to operate an open-shop policy to this date. In April, 1918, the Minnesota Commission of Public Safety, a body created in 1917 by the Minnesota Legislature, with power to prevent and compose labor disputes, made its order No. 30, directing that during the pendency of the war employers then maintaining union shops were not to introduce non-union labor and that no steps were to be taken to unionize shops that were being conducted on the open-shop basis. This order, while depending primarily for its authority upon the State statute, was also supported by an agreement between the Minnesota Manufacturers' Association and the State Federation of Labor. Nevertheless, it appears convincingly from the record in this case that the only real or effective cause of the present controversy was and is a determination on the part of the labor unions to unionize these open-shop plants. Your predecessor, in his decision, conceded that, upon the papers actually before him, the record was persuasive to the effect that the labor dispute was fictitious and represented an agitation by irresponsible persons other than the workmen concerned, rather than a real condition in the labor field requiring adjustment. Nevertheless, deeming himself bound by the determination of the War Labor Board, presently to be mentioned, he accepted the finding that there was an actual labor dispute and an actual risk of interruption of the production of munitions. It is my view that, whether you deem this finding of your predecessor correct or incorrect, you should treat it as binding upon you.

5. The War Labor Board took cognizance of the controversy, although neither the employer company nor the Government, through its ordnance officers or otherwise, was a party to the submission thereof. The Steel & Machinery Co. entered a plea to the jurisdiction of the War Labor Board, which plea was overruled November 22, 1918, after hearing had. Thereafter a majority of the members of the Labor Board of date April 11, 1919, made certain "findings and recommendations" as to increases of pay effective from October 1, 1918, hours of service, the right of workers to organize in unions or join same without discrimination by the employer, reinstatement of certain named employees, the right to bargain collectively, and provided for reference of differences as to the application and interpretation of the award to a representative administrator to be appointed by the War Labor Board. The employers' group of the Board did not agree to the above finding and recommendations and filed a minority report. As might be expected from the nonparticipation of the Ordnance Department as a part to the submission, the proceed-

ings and conclusions of the War Labor Board are not deemed satisfactory or even fair by the Ordnance Department. Officers of the Ordnance Department were at all times present and on duty in the company's plant as inspectors and were personally familiar with labor conditions therein and with the output under the Government contracts, but none of such officers was called to testify before the War Labor Board. The case was taken up solely at the request of the representative of the local labor union, and the record does not disclose that the Ordnance Department or its officers ever requested action by the Labor Board, or that request to do so was ever made by employees to the Ordnance Department. By letter dated November 2, 1919, Maj. F. R. Schank, Ordnance Department, Production Supervisor, Minneapolis Sub-District Office, advised the District Production Office, Chicago, Ill., that he had just returned from a preliminary hearing before the Labor Board as to complaint against the Minneapolis Steel & Machinery Co., and that

"The reading of complaint today was the first authentic information which I have had that any labor difficulties existed. * * * The six commissioned army officers and two chief civilian employees of the Production and Inspection Departments having to do more or less intimately with all parts of the Mpls. Steel & Machy. Co., are united in saying that there has been no evidence for several months of any general dissatisfaction such as was apparent in April, May and June."

Maj. Schank further stated that between June 1, 1918, and October 14, 1918, the company increased the wages of a very large number of its employees and attached to his letter comparative tables showing such increases in detail. The writer further stated:

"As a rule the wages paid by the Mpls. Steel & Machy. Co. have been approximately the same as those paid by similar plants—perhaps a trifle higher largely on account of the more important and difficult work being done by the company. * * * That there is no serious decrease in production at the plant of the Mpls. Steel & Machy. Co. by reason of dissatisfaction among its employees, must be evident to anyone who is at all familiar with the manufacture of Ordnance material in the United States, because the Mpls. Steel & Machy. Co. has been producing more large gun carriages than any other private plant in the country, has reached its scheduled daily output of gun carriages for the last several days and is one of the largest machiners of 155 m/m shell of all the plants engaged therein in the country."

6. The Steel Co. has consistently refused to recognize the effectiveness of the determination of the War Labor Board or to pay increased wages or to do any other act in deference thereto; and its legal right so to refuse has been upheld by the courts. Having submitted no controversy to the War Labor Board, the Steel Co. has denied its jurisdiction in the premises, basing its position chiefly on

the provisions of the presidential proclamation of April 8, 1918 (40 Stat. 1766), creating said Board, which provided:

"The powers, functions and duties of the National War Labor Board shall be to settle by mediation and conciliation controversies arising between employers and workers in fields of production necessary for effective conduct of the war, or in other fields of national activity, delays and obstructions in which might, in the opinion of the National Board affect detrimentally such production."

It is difficult to find satisfactory legal ground for rejecting the Steel Co.'s contention upon this point. Nevertheless the War Labor Board decided in favor of its own power to compel the Steel Co. to pay higher wages, and your predecessor apparently reached the same conclusion. Any question as to whether the War Labor Board really possessed the power in question did not affect the authority or jurisdiction of your predecessor to make a decision under the Dent Act; neither did that question affect the obligation of the Government to redeem the promises made in its name by Mr. Rose in his public speeches. It is deemed proper, therefore, for the present purpose, to assume the correctness of the ruling of your predecessor upon this point.

7. The further history of this case is material principally upon the question whether there has been such "presentation" of the claims before June 30, 1919, as is required by the Dent Act as a condition precedent to the exercise by the Secretary of War of his power to adjust pay. In several communications in May, 1919, the business agent of District No. 77, International Association of Machinists, informed the War Labor Board of the refusal of the Steel Co. to pay the increases required by such Board and requested that an administrator be sent to Minneapolis to enforce such award. About June 1, 1919, the Board sent its administrator, Mr. Alphous Winter, to Minneapolis to investigate the complaints. The company informed Mr. Winter that it would not pay the wage increases from its own fund, but was willing to act as the disbursing agent of the Government in the matter. Mr. Winter thereupon wired the National War Labor Board. This telegram is not with the files and seems not to be available, but the purport thereof appears from the following excerpts from the letter affidavit of Mr. Winter, dated February 10, 1920:

"As Administrator for the National War Labor Board I was transferred from the Bethlehem Steel Company case to the Minneapolis cases on or about the date mentioned, June 1st, 1919. In my conferences with the labor side and their legal representatives, Latimer & Latimer, I stated that I could not believe that the Government would pay retroactive wages to the employees of the Bethlehem Steel Company and not do likewise to the employees at Minneapolis. My opinion was then and still is that any other line of action by the Government would be gross discrimination. * * * Just before

my recall from Minneapolis I received word from the National War Labor Board that there was no probability of such an adjustment. The telegrams, letters, etc., covering this point would be on file with the records of the National War Labor Board at Washington. I did not take up with the War Department direct the question of paying retroactive wage to the Minneapolis employees, but it was the spirit, if not the letter, of my telegram that the question should be presented by the National War Labor Board to the Ordnance Department, as was done in the Bethlehem Steel Company case. Whether this matter was referred by the War Labor Board to the War Department or not, I know not. * * * I do not know of any other claim in any form that was filed by any other person, covering the Minneapolis cases."

The telegram apparently was sent prior to June 20, 1919, since it appears that Mr. Winter on that date wired Mr. Latimer, an attorney for the employees, from Milwaukee, Wis., that he had been ordered to Milwaukee and Chicago on other business. Of date July 22, 1919, Mr. Latimer wrote Mr. Winter at Washington, stating:

"I received your telegram on June 20, from Milwaukee, Wis. * * * I would appreciate it very much if you would give me what information you can * * * if you ever received any encouragement in any reply to your telegrams regarding the payment of any such pay to the employees of the Minneapolis Steel and Machinery Company? Also would you let me know who is the proper party to get in touch with regarding this matter of payment. We are going to take this matter up with the proper authorities and see if something cannot be done along the lines you suggested."

From the findings of fact made by the Board of Contract Adjustment it appears that upon receipt of Mr. Winter's telegram from Minneapolis by the War Labor Board, Mr. W. B. Angelo, assistant chief administrator of the Board, by telephone and personal interviews discussed the matter of the claims of the employees with Mr. Payson Irwin, special assistant to the Chief of the Industrial Service of the Ordnance Department; that this was about the middle of June, 1920; that Mr. Angelo testified that he gave Mr. Irwin the history of the claims and the basis therefor and that one of his purposes in taking the matter up with Mr. Irwin was to place the responsibility of carrying out the agreement of the Government upon the proper official so far as he could; so that at Mr. Angelo's request Mr. Irwin made an investigation to see if the War Department had any means of paying the men and reported to Mr. Angelo that he did not see any way in which the War Department could pay them. The first claim of the employees for the wage increases, received by the War Department, other than was embodied in the foregoing interview between Mr. Angelo and Mr. Irwin, was on August 8, 1919, when the Secretary of War received various written communications from interested labor unions.

Your predecessor sustains his power to adjust and pay these claims on the theory that presentation by the labor unions to the War Labor Board of their complaint against the Steel Co. amounted to such presentation as the Dent Act demanded. Since neither that complaint nor the award founded upon it sought to charge the Government with any obligation, but only the Steel Co. and other employer concerns, I find myself unable to share your predecessor's view above stated. I am nevertheless of opinion that his legal reasoning was correct when, in his decision, he said:

"if I am right in my earlier holding that the War Labor Board was such an agent of the President as is described in the Dent Law; namely, such an agent of the President as had authority to create an obligation which the Secretary War could pay and adjust, and such agent has in fact undertaken both to create the obligation and to liquidate it, then it would follow as a matter of course that notice to it with regard to a matter within its jurisdiction would be notice to the Government."

The proposition that the Secretary of War is entitled to treat as a duly presented Dent Act claim one of which seasonable notice has been given to the agent legally competent to bind the Government by an agreement cognizable under the Dent Act, has also the support of Attorney General Palmer (32 Ops. Atty. Gen., 48, 50).

If, therefore, Mr. Rose, representing the War Labor Board, was such an agent and if Mr. Winter was a proper representative of the War Labor Board for receiving a claim under the Dent Act, in so far as that Board itself had power to bind the Government by receiving such a claim, I am of opinion that there is no error of law involved in holding that a claim seasonably presented to Mr. Winter would constitute a duly presented Dent Act claim. The record contains, it is true, inadequate support for a finding that Mr. Rose or Mr. Winter had authority to represent the War Labor Board for the purposes indicated and very slender support for the finding that anything intended as, or which may justly be treated as, a claim under the Dent Act was presented to Mr. Winter, although some support therefor is found in a conversation between Mr. Winter and Mr. Latimer, attorney for certain claimants. Nevertheless these doubts relate to questions of fact, upon which findings favorable to claimants are probably to be implied in the decision rendered by your predecessor. If, therefore, the War Labor Board had authority in law to enter into an agreement cognizable under the Dent Act, I should not feel at liberty to advise you to disregard the decision of November 30, 1920.

8. The history of the consideration of these claims in the War Department may be briefly stated. The Board of Contract Adjustment, after a hearing, upheld the claims June 3, 1920 (6 Dec. Bd. Cont. Adj., 131), on the ground that Mr. Rose entered into an agree-

ment to guarantee payments by the Steel Co. in accordance with the award of the War Labor Board, and that the claim was presented by Mr. Angelo of the War Labor Board to Mr. Irwin, an employee of the Ordnance Department. The standing committee of the War Department Claims Board, reviewing the decision of June 3, 1920, reported adversely to the claims on the double ground that there was no binding contract and that there had been no valid presentation of the claims under the Dent Act. Upon the consent of the Claims Board, granted July 23, 1920, the recommendations of its standing committee were transmitted the same day to the Secretary of War. In these recommendations I concurred August 11, 1920, citing 25 Comp. Dec., 759 (J. A. G., 248.8). The Secretary of War, August 11, 1920, directed the rejection of the claims, and they were rejected by the action of the standing committee August 25, 1920. The Secretary granted a rehearing, which was had before him September 22, 1920. In response to an invitation for a further expression of the view of this office I transmitted to the Secretary, with my approval, a memorandum by Col. F. M. Brown, J. A., dated October 4, 1920, in which obstacles regarded as insuperable to allowing the claims were pointed out. The Secretary, nevertheless, reached a final conclusion favorable to the claims and announced the decision already referred to.

The views of this office, as stated in its memoranda of August 11 and October 4, 1920, are before you and do not require restating here. In some respects which have already been referred to, those views are no longer applicable to the situation because of contrary findings and conclusions adopted November 30, 1920, which must now be regarded as having passed beyond the domain of controversy. Otherwise I find no reason to modify the views therein expressed.

9. The defect in your predecessor's decision, which I deem fatal to your giving effect to it, is in holding that Mr. Vernon J. Rose had due authority, as an agent of the President, to promise that public funds would be paid to the employees of the Steel Co. to compensate them for continuing to work for the Steel Co., instead of striking. It may well be questioned whether the President himself could effectively have bound the Government by such a promise, had he made it, and whether, under the law, his power to protect the Nation against the risk of interruption in the supply of munitions was not limited, in the contingency suggested, to requisitioning and operating the plants (sec. 120 of National Defense act of June 3, 1916, 39 Stat., 166, 213; sec. 12 of act of August 10, 1917, 40 Stat., 276, 279). However this may be, it is entirely clear that neither the War Labor Board nor Mr. Vernon J. Rose was authorized to act as the President's agent for the purpose of making any such promise. There is no issue of fact as to the President's acts or dealings. The sole ques-

tion is a pure question of law as to whether in legal interpretation the President's proclamation of April 8, 1918 (40 Stat., 1766), purported to confer such authority upon the War Labor Board. Your predecessor interpreted the proclamation as purporting to confer (and actually conferring) such authority, saying:

"If the President had sent for the Secretary of War and told him that he personally had examined the labor situation in Minneapolis, and had come to the conclusion that the workers in the Minneapolis Steel and Machinery Company should be given additional compensation in order to enable them to meet the advanced cost of living, and to devote themselves contentedly to the important production upon which they were engaged, and that he had told the employees in that plant to go forward with production and that he would see that they were additionally and justly compensated, there cannot be any reasonable question that such a statement and such action by the President would have constituted a claim under the Dent Act which the Secretary of War would be authorized to pay and adjust. Instead of doing this, however, the President created the War Labor Board to deal with all situations of this sort, and to devote an amount of time to the general labor situation which it was quite impossible for the President to extract from his overburdened hours. In my opinion the action of the War Labor Board was, therefore, the action of the President, and is equally binding upon me."

In this view there seems to be manifest error. The President defined the authority which he intended to confer upon the War Labor Board to be "to settle by mediation and conciliation controversies arising between employers and workers" and "to summon the parties to controversies" (i. e., employers and workers) "for hearing and action by the National Board in the event of failure to secure settlement by mediation and conciliation." There may be room to contend that the "action" contemplated included a compulsory order for the payment of higher wages by employers, although your predecessor's view to this effect has thus far not been shared by the courts (*Grewert v. American Hoist & Derrick Co.*, decided Dec. 5, 1919, by Judge F. N. Dickson, of the District Court of Ramsey County, Minn.; 266 Red., 961). It seems too plain for argument, however, that the functions of the War Labor Board were limited by the President to the relations existing between employers and workmen and did not extend to creating obligations on the part of anyone (including the Government) who in respect of the controversy in question was neither an employer nor a workman nor did such functions extend to bringing into existence the relation of employer and workman.

The promise to pay out of public funds, made by Mr. Rose, was therefore ineffective to charge the credit of the United States for want of authority from the President contained in the proclamation of April 8, 1918, or otherwise conferred. Since the existence of such authority is a condition precedent, under the terms of the Dent Act,

to the enjoyment of power on your part or your predecessor's part, to adjust and pay, it follows that the decision of November 30, 1920, is in law a nullity and you are not authorized to incur any expense or take any step looking toward the ascertainment or settlement of the several amounts claimed.

10. From what has been said it is apparent that I share the view of the Chief of Ordnance stated in paragraph 12 of this fourth indorsement, dated March 18, 1921, and I am unable to share in their entirety the views expressed by the vice chairman of the War Department Claims Board and by the present Assistant Secretary of War in their respective memoranda of April 2 and April 11, 1921. I am, however, entirely in accord with their view that the present unfortunate situation is worthy of the consideration of Congress and that, except in virtue of further action by Congress, no payment should be made to the claimants. On the latter point the Assistant Secretary said in his memorandum:

"Probably not to exceed one-third of the cases at Minneapolis can be adjusted and paid by the end of this fiscal year; therefore, it will be necessary for the War Department to go to Congress in any event for an appropriation both for administration and payment of such cases as have not been passed upon and paid before June 30th.

"It would be an unfortunate situation, if the War Department would pay one-third of the cases, and Congress would refuse to appropriate the balance."

11. My recommendation is that, in case the foregoing views meet with your approval, claimants be informed (1) that you have been constrained to decide that the War Department is without power to adjust and pay the claims under the Dent Act or otherwise; (2) that in your opinion the matter is one which merits consideration and disposition by Congress; and (3) that if claimants decide to lay the matter before Congress, the War Department will endeavor in every way to obtain early consideration by Congress.

E. A. KREGER,
Acting Judge Advocate General.

JUNE 9, 1921.

Case No. 1206.

In re **CLAIM OF CHARLES H. MURRAY.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

This claim was decided adversely to claimant on February 23, 1921, by the Appeal Section, War Department Claims Board. On appeal to Secretary of War, said decision was vacated. For statement of facts and decision, see Volume IV, page 812; Volume VIII, p. 642.

Upon consideration of the appeal and record in the above-entitled claim, I direct that the decision of the Appeal Section, War Department Claims Board, denying relief, be vacated and that the War Department Claims Board make an award of thirteen hundred dollars (\$1,300.00) in full settlement of the above claim.

JOHN W. WEEKS, .
Secretary of War.

JUNE 22, 1921.

Case No. 1206.

In re **CLAIM OF CHARLES H. MURRAY.**

Capt. Frazer writing the opinion of the Board.

FINDINGS OF FACT ON RECONSIDERATION.

The Board finds the following to be the facts:

1. This case was decided adversely to claimant by the Appeal Section, War Department Claims Board, February 23, 1921, reported in Volume VIII, part 3, page 262, and Volume IV, page 812, as case No. 150-C-1206. Reference is hereby made to these two decisions for a full statement of facts.

2. From that decision claimant noted an appeal to the Secretary. The Secretary of War, upon consideration of the record under date of June 9, 1921, returned the record to the War Department Claims Board with the following order:

"Upon consideration of the appeal and record in the above entitled claim, I direct that the decision of the Appeal Section, War Department Claims Board, denying relief, be vacated and that the War Department Claims Board make an award of thirteen hundred dollars (\$1,300.00) in full settlement of the above claim."

3. By direction of the Secretary of War, contained in the foregoing order, the decision of the Appeal Section, War Department Claims Board, of February 23, 1921, is hereby vacated and set aside, and the order denying relief to claimant dated February 23, 1921, is vacated, recalled, and for naught held.

4. In pursuance of and in accordance with the order of the Secretary of War the Appeal Section, War Department, finds for the claimant in the sum of \$1,300.

DISPOSITION.

The Appeal Section, War Department Claims Board, will prepare a document setting forth the nature, terms, and conditions of the agreement, Certificate Form "C," and make a statutory award in accordance with this decision and will cause the same to be executed on behalf of the United States and by the claimant and to be transmitted to the appropriate finance officer for payment.

Lieut. Col. McKeeby and Lieut. John H. Tabb concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

JUNE 2, 1921.

Cases Nos. 3049 and 3051.

In re **CLAIMS OF THE UNITED STATES CARTRIDGE CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

These claims were disposed of by the Appeal Section, War Department Claims Board, February 21, 1921, by denying relief to claimant. On appeal to the Secretary of War, decisions affirmed. (See Vol. VIII, p. 613.)

Upon consideration of the appeal and record in the above-entitled cases, the action of the Appeal Section denying relief is affirmed.

JOHN W. WEEKS,
Secretary of War.

JUNE 2, 1921.

Case No. 3037.

In re **CLAIM OF THE WINCHESTER REPEATING ARMS CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

Upon appeal to the Secretary of War, the decision of the Appeal Section, War Department Claims Board, dated March 1, 1921, was affirmed. (See Vol. VIII, these decisions, p. 679.)

Upon consideration of the appeal and record in the above-entitled claim, the action of the Appeal Section denying relief is affirmed.

JOHN W. WEEKS,
Secretary of War.

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MARCH 15, 1921.

Case No. 3067.

In re CLAIM OF ATLAS POWDER CO.

1. **INFORMAL AGREEMENT—COST OF PROSECUTING CLAIM.**—Under the act of March 2, 1919, a contractor can not be reimbursed for expenses incurred in preparing and prosecuting a claim.
2. **CLAIM AND DECISION.**—Claim for \$15,123.97, under the act of March 2, 1919, for expenses of preparing and prosecuting a claim and for certain assistance given the Government. Held, claimant can not be reimbursed for the expense of prosecuting the claim, but should be paid for certain special assistance.

Capt. Miller writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Ordnance Section, War Department Claims Board, and involves the item of expense incurred by claimant in preparing and proving a claim arising through the suspension of proxy-signed contract No. P 2674-583 E.

2. Under date of February 1, 1918, the Atlas Powder Co. entered into a proxy-signed contract with the United States of America whereby the former was to construct and operate an ammonium nitrate plant at Perryville, Md. The contractor under the terms of this contract was to be paid "all costs actually or necessarily incurred in the construction and equipment of the plant, and in addition a construction fee equivalent to three and one-half per cent ($3\frac{1}{2}\%$) of the entire cost of the creation and construction of the plant" and was also to be paid "all costs of operation" and an operation fee of three-eighths of 1 cent for each pound of ammonium nitrate produced until December 31, 1919. After the Armistice the contract was suspended, and the contractor waived all rights to fees and percentages that would have arisen subsequent to February 15, 1919.

3. The claim arising under this contract was filed in the early part of the year 1919, and claimant thereafter was required to furnish considerable proof in connection with the prosecution of the claim. Some of its employees devoted much time to preparing data for the claim, and various expenses were incurred by claimant in furnishing information to the War Department. The matter before the Appeal Section covers the salaries of employees, amounting to

\$13,801.70, alleged by the contractor to have been paid to these employees for services performed while engaged in the preparation and proof of the main claim, and traveling expenses of employees, amounting to \$1,322.27, incurred in connection with the same work.

4. The principal charge is one for 50 per cent of the salary of claimant's manager of ordnance who was working on this and other claims; salaries of the assistant manager of ordnance and of accountants, property clerk, stenographers, and typists are also included. Claimant also urges the Appeal Section to consider other items, but the appeal covers only the salaries and traveling expenses of employees in preparing and proving the main claim.

5. In the course of an investigation of the claim, the War Department ordered a complete audit of the Perryville plant. While this audit was in progress, claimant was called on at numerous times for assistance. Also at other times the Government requested assistance of claimant's assistant manager of ordnance, which did not arise under a proof of the claim.

6. Although the claim was originally filed as covering expenses of preparing and proving the "Perryville claim," claimant now contends that the entire expense was incurred in assisting the Government. However, the Government does not agree with such a theory, as much of claimant's expense was incurred in furnishing evidence that was actually necessary to prove its claim.

DECISION.

1. It has never been the policy of this Board to allow a claimant the expenses incurred in the preparation and presentation of its claim, whether these expenses are the result of the services of accountants, attorneys, or technical experts. Such expenses are not thought properly reimbursable under the act of March 2, 1919, which authorizes the Secretary of War "to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis that has been entered into in good faith during the present emergency and prior to November twelfth, nineteen hundred and eighteen, by any officer or agent acting under his authority, direction, or instruction, or that of the President, * * * or for the production, manufacture, sale, acquisition, or control of equipment, materials, or supplies, or for services, or for facilities, or other purposes connected with the prosecution of the war." Such services are not and can not be construed in any way to fall under the authorization of the act, nor are they for the purpose therein provided under which they should fall to be considered as a proper item for reimbursement.

2. When a contractor desires to present a claim to the Secretary of War, the contractor must not only stand the expense of preparing the original forms filed with the War Department but must be ready to furnish the Government such further proof as may be necessary to substantiate the claim. Many claimants have thought their original evidence sufficient, but have been required to furnish additional proof of a more definite nature before this Board can properly determine the claim. And all such proof has been furnished at the expense of the claimant.

3. During the entire period of existence of the Board of Contract Adjustment all parties prosecuting claims before that Board were required to assume the expenses of preparing their evidence. This included not only the furnishing of various papers, documents, reports of accountants, etc., but each claimant when granted a hearing produced his own witnesses at the hearing, and paid the expenses of these witnesses. The same procedure was adopted by the Appeal Section, War Department Claims Board, when it succeeded the Board of Contract Adjustment.

4. Both the Board of Contract Adjustment and the Appeal Section have consistently held that claimants could not charge to the Government expenses incurred in preparing, presenting, proving, and prosecuting their claims. The act of March 2, 1919, does not authorize the Secretary of War to reimburse the claimant for expenses incurred in prosecuting a claim against the War Department. (E. L. Long, Case No. 2909, vol. 7, pt. 4, these decisions.) This act does not authorize the Secretary of War to reimburse a claimant the expenses of an attorney in prosecuting a claim against the War Department. (Sieber & Fleming, Case No. 2849, vol. 7, pt. 2, these decisions.) A charge made by a claimant for extra work done in rePreparing a claim for presentation to a claims board in accordance with forms furnished by that Board and for subsequent work in connection with the claim can not be paid by the Government, even though the item does not include any charge for the preparation and filing of the original claim. (Platt Iron Works, Case No. 2914, vol. 8, these decisions.)

5. Cost-plus contracts come under the same rule as other contracts with respect to the charges for prosecuting claims. While the contract provides for the payment by the Government of costs plus certain fees or percentages, it is clear that the Government is not bound to reimburse the contractor for every expense arising under the contract. This expense is one that must be paid from the fees allowed the contractor. Certain expenses it must pay from its compensation provided for in the contract. (Comp. Dec., Atlas Powder Co., October 11, 1918.)

6. Although claimant can not be reimbursed for expenses in connection with presenting or proving its claim, it is evident that in this particular case claimant rendered the Government valuable assistance at times under request of the Government, and incurred expenses which would not have arisen through the preparation or proof of claim. This is especially true as concerns a portion of the services of Mr. J. A. Byrom, claimant's assistant manager of ordnance, who greatly assisted the Government in furnishing information which was beyond the ordinary proof required in determining a claim, and applies to some services rendered by minor employees.

7. The Appeal Section will not determine the amount due claimant for this assistance, except to find that claimant can not be allowed the entire claim of \$15,123.97, as it is clear that some of this expense was incurred in furnishing evidence to properly prove its claim. The Ordnance Section having investigated the entire claim arising under contract No. P 2674-583 E, is in a position to determine the portion of the expense which should be charged to the preparation and proof of claim and the amount that should be allowed for special assistance given the Government.

DISPOSITION.

The Appeal Section, War Department Claims Board, will transmit this decision to the Ordnance Section, War Department Claims Board, for appropriate action.

Lieut. Col. McKeeby and Capt. Frazer concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

MARCH 25, 1921.

Case No. 3066.

In re CLAIM OF JEWEL TEA CO.

1. **TEMPORARY IMPROVEMENTS.**—Where the United States takes possession of claimant's plant under the act of August 10, 1917, and claimant is obliged to acquire a new building and make permanent improvements thereon which enhance the value of the building, and also temporary improvements which could only be used by an occupant of the building engaged in the same business (roasting coffee and tea), and said temporary improvements are dismantled after the United States returns claimant's plant to it, claimant is entitled to be reimbursed the cost of expenditures made for such temporary improvements, less the salvage thereon.
2. **EXTRA COST OF PRODUCTION.**—Where the United States takes over claimant's plant, as recited in paragraph 1 above, and claimant is therefore obliged to handle its incoming green coffee and tea several more times than he would have handled it had its plant not been requisitioned, and is obliged to ship a part of the green coffee and tea to Chicago which would have been roasted in its plant before being shipped, and incurs other expenses which would not have been incurred if its plant had not been requisitioned, claimant is entitled to reimbursement for the extra loss and expense so incurred.
3. **CLAIM AND DECISION.**—Appeal from an award of the Appraisal Section. Held, claimant entitled to certain items as recited in paragraphs 1 and 2 above, but is not entitled to attorney's fees and expenses incurred in preparing and prosecuting the claim. Certain other items are also disallowed.

Capt. Taylor writing the opinion of the Board.

STATEMENT OF FACTS.

1. This claim is before the Appeal Section, War Department Claims Board, on appeal by claimant from a final award thereon, made by the Appraisal Section, War Department Claims Board, December 31, 1920. The War Department Claims Board, by resolution, granted the Appeal Section jurisdiction in this claim.

2. The facts relative to this claim are as follows: In the spring of 1918 claimant was the occupant of unit E of the Bush Terminals at Hoboken, N. J., under a lease extending over a period of 21 years

from January, 1917. Claimant had been in operation in this building only a few months. It was a 12-story building, containing 235,000 square feet of floor space. Claimant had expended approximately \$200,000 in equipping the building as a coffee and tea roasting and storage plant, it being equipped with the most modern machinery and appliances used in that business, a considerable portion of which constituted permanent fixtures.

3. Early in the spring of 1918 the Quartermaster Department of the United States Army acquired a portion of the space in the building in question, the rental therefor being fixed by agreement between the parties. At about the same time the Ordnance Department decided that the entire building was necessary for its use. A requisition, dated February 28, 1918, was served upon claimant March 1, 1918, requisitioning the property for the Ordnance Department. This action purported to be under the authority of the act of August 10, 1917.

4. A controversy then arose between the Quartermaster Department and the Ordnance Department relative to the possession of the building. This controversy terminated in favor of the Ordnance Department, and on April 15, 1918, claimant was notified that the entire building would be taken over by the United States for the use of the Ordnance Department. At the time the requisition above mentioned was issued it was the intention of the Ordnance Department to turn over this building to the Remington Arms U. M. C. Co., to be used by that company in the manufacture of ammunition for the United States. After the premises were vacated by claimant the building was turned over to the Remington Arms U. M. C. Co., and was used by that company.

5. Considerable time was spent in a futile effort to commandeer a building, known as the Ellis Building, located in New York City, in order that claimant could move its machinery and equipment into that building and continue to conduct its business therein. This plan was finally abandoned when it was learned that no authority existed for such a procedure. Claimant then began negotiations for the purchase of a building at Newark, N. J., known as the Ford Building. This property was purchased by claimant on July 15, 1918, at the price of \$97,500, but subject to a lease that would not expire for about three months. In order to get immediate possession of this building claimant was compelled to pay the lessee thereof \$9,177.66 for the unexpired lease. Claimant spent a considerable sum in repairing the Ford Building, some of the improvements being of a permanent nature and some of a temporary nature—i. e., improvements which could only be used by an occupant of the building engaged in the

coffee and tea roasting business and which could not be used for any other purpose.

Such of the machinery and equipment at the Hoboken plant as could be used in the Newark plant was removed by claimant from the Hoboken plant and installed in the Newark plant. Claimant also purchased a considerable quantity of temporary machinery, and installed this in the Newark plant. This machinery was much lighter than similar machinery in the Hoboken plant. The machinery in the Hoboken plant which could not be used in the Newark plant was removed by the Ordnance Department and stored in a warehouse on Staten Island. Some of this machinery was very heavy, and it was greatly damaged in the process of removal.

6. On September 1, 1919, the building at Hoboken was returned to claimant, but it was not until January 1, 1920, that the machinery stored on Staten Island was returned to claimant, and it was some months thereafter before claimant was able to reinstall the machinery in its Hoboken plant and get the same in operation again.

7. At the time the requisition order was served upon claimant company, and at various other times, both prior and subsequent thereto, claimant was told by various officers of the Ordnance Department that it would be fully reimbursed by the United States for the removal and installation expenses and all incidental damages which had been or would be sustained by it by reason of the property taken by the United States.

8. The claim was originally presented to the Board of Appraisers on the theory that the property had been taken under the act of August 10, 1917. After considering the claim the Board of Appraisers decided that the taking of the plant under the act of August 10, 1917, was unauthorized, and, therefore, the claim properly came within the purview of the act of March 2, 1919. A certificate, Form "C," and the accompanying document were issued under date of May 4, 1920, by the War Department Board of Appraisers, now the Appraisal Section, War Department Claims Board. That Board has made a number of awards on this claim, said awards covering various items for expenditures incurred by claimant in removing its machinery, equipment, etc., from the Hoboken plant; expenditures for putting the machinery, equipment, etc., back in the Hoboken plant; and for damages to the machinery and equipment. Under date of December 31, 1920, the Appraisal Section made an award which purported to be a final award. It is from this award that claimant has appealed to the Appeal Section.

The items of the claim which were disallowed by the Appraisal Section are numbered items, divided into groups, as follows:

GROUP I.

ITEMS 21 TO 31, INCLUSIVE.

Expense of emergency installation at Newark (excluding cost of all items constituting assets and including salvage values).

21. Labor on temporary installation by Huntley Manufacturing Co. employees-----	\$12,536.27
22. Miscellaneous fittings and lumber-----	254.91
23. Preliminary examination of Ford Building (Chas. Fall)-----	250.60
24. Architect's services, Ford Building (Chas. Fall)-----	830.00
25. Special plumbing (Williamson)-----	3,699.60
26. Pay of Jewel Tea Co. employees supervising installation-----	3,220.83
27. Dust collectors (Huntley Manufacturing Co.)-----	1,120.00
28. Duplicate telephone service (Bank St. Warehouse)-----	30.53
29. Special electrical work (Davis)-----	3,750.32
30. Special bins, partitions, and other equipment (Young)-----	3,903.93
31. Special decorating (Jensen)-----	120.89
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Actual loss on emergency installation at Newark-----	29,717.28

GROUP II.

ITEMS 123, 122, 124, 44, 45, 55, 46, 56, 47.

Increased costs Newark over Hoboken during emergency period (definitely ascertainable items constituting additions to manufacturing and merchandise costs).

123. Net charges paid for extra handling from ship to Newark plant. (Consolidation of former items 41 and 51—green coffee only)-----	\$14,781.20
122. Incoming green coffee lost by extra handling from ship to Newark plant. (Consolidation of former items 42 and 52)---	38,795.69
124. Trucking expense through lack of railroad siding at Newark. (Consolidation of former items 43 and 53)-----	13,734.29
44. Increased insurance Newark over Hoboken-----	13,291.04
45. Freight paid on excess weight of green over roasted coffee prior to Sept. 1, 1919-----	1,496.34
55. Freight paid on excess weight of green over roasted coffee, period from Sept. 1, 1919, to July 18, 1920-----	110.86
46. Trucking in Chicago up to Sept. 1, 1919, account lack of capacity Newark plant and resulting necessity of roasting in Chicago--	16,127.58
56. Trucking in Chicago from Sept. 1, 1919, to July 18, 1920, account lack of capacity Newark plant and resulting necessity of roasting in Chicago-----	190.32
47. Demurrage in Chicago through inability to receive heavy shipments caused by speed of removal from Hoboken-----	846.37
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Total of the definite items increasing manufacturing and merchandise costs during emergency period-----	99,873.69

GROUP III.

ITEMS 91, 9, 111, 68, 96, 13, 4.

91. Engineer's fees on power wiring-----	\$281. 29
9. Expenses of vice president incident to removal-----	349. 85
111. Expense for services of special counsel-----	10,000. 00
68. Salary and expenses of employees in preparation and prosecution of claim-----	17,874. 34
96. Salary of employees supervising installation-----	1,241. 67
13. Loss by purchase of lease on Ford Building, as necessitated by pressure to vacate Hoboken plant-----	9,177. 66
4. Freight charges from Hoboken to Chicago and elsewhere on outgoing merchandise and equipment-----	19,143. 70
Total of items 91, 9, 111, 68, 96, 13, and 4-----	58,068. 51

RECAPITULATION.

GROUP I.

9. The items enumerated in Group I are self-explanatory. These are items covering expenditures which claimant has designated as having been made for improvements of a temporary nature as distinguished from improvements made which were of a permanent nature. The testimony shows that claimant spent approximately \$40,000 for improvements on the Newark plant which it considered of a permanent nature—i. e., permanently improved the building and enhanced the value thereof accordingly. Claimant is not asking for any reimbursement for improvements made which are of a permanent nature, but is asking for reimbursement on the items above enumerated on the theory that these improvements were of such a character as could be used by an occupant engaged only in the tea and coffee roasting business. The Appraisal Section disallowed the items in this group on the theory that claimant purchased the plant at Newark, New Jersey, with the intention of making it a permanent coffee and tea roasting plant, and that therefore the improvements which claimant has designated as of a temporary character were erroneously so designated, and were really permanent improvements.

GROUP II.

10. The items enumerated in this group constitute what claimant has designated as extra expenses incurred by reason of the Government taking over its Hoboken plant and forcing claimant to conduct its business on a much smaller scale in the Newark plant. These extra charges represent the cost of extra handling of green coffee from the ship to the Newark plant. The Hoboken plant was equipped so that coffee and tea could be unloaded direct from the lighters to trucks on elevators which would carry the articles to the floor on which they were to be stored. The transfer of coffee and tea

from lighters to the Newark plant necessitated additional handling and hauling, as represented by items 123, 122, and 124.

Item 44 represents the increased cost of insurance at the Newark plant over the Hoboken plant, due to the higher rate prevailing on the Newark plant than prevailed on the Hoboken plant. Claimant admits that it is liable for the insurance premiums based on the rates prevailing on the Hoboken plant. This item is for the increased rate—i. e., the difference between Hoboken and Newark plants.

Items 45 and 55 represent freight paid on excess weight of green coffee over roasted coffee. This is green coffee which claimant would have roasted at its Hoboken plant but which it was not able to roast at its Newark plant owing to lack of capacity. The green coffee was shipped to Chicago and there roasted. These two items are for the difference in freight rate between roasted coffee and green coffee.

Items 46 and 56 represent the cost of trucking green coffee from the railroad to the plant in Chicago. This shipment of green coffee to Chicago was necessitated by the circumstances related in connection with items 45 and 55 above.

Item 47 is for demurrage charges on green coffee paid in Chicago through claimant's inability to receive heavy shipments caused by the necessity of a speedy removal of the green coffee from the Hoboken plant at the time the Ordnance Department took possession of the Hoboken plant.

GROUP III.

11. These items are miscellaneous. Item 111 represents a fee paid by claimant for services of special counsel employed to prosecute this claim before the War Department Board of Appraisers. Claimant has presented no claim for counsel fees to its regular attorneys.

Item 68 represents salaries and expenses of claimant's employees in preparation, prosecution, and presentation of this claim.

Item 4 represents freight charges from Hoboken to Chicago and elsewhere on outgoing coffee and tea which had been purchased by claimant before the Hoboken plant was taken over by the Government, but which came into port at New York after the Government took possession of the Hoboken plant. When this coffee and tea reached port claimant did not have sufficient room in the Newark plant to take care of the same, and consequently was obliged to store it in New York or ship it to some of its inland plants to be roasted.

DECISION.

GROUP I.

1. The record in this case shows that during 1917 claimant's volume of sales amounted to \$15,847,603.59, on which it made a net

profit of \$1,350,807.25. During 1918 the volume of sales amounted to \$15,598,495.81, on which claimant made a net profit of \$92,039.75. During 1919 the volume of sales amounted to \$16,538,635.38, on which claimant sustained a net loss of \$1,274,045.81. These figures afford some idea of the enormous loss which this company has sustained by reason of the taking over of its Hoboken plant by the Government. However, it is impossible to even approximately estimate the enormous loss to its future business which claimant must have suffered by reason of having been deprived of its Hoboken plant from July, 1918, until January 1, 1920. No claim is made for such a loss.

The items enumerated in this group are for expenditures which claimant actually made on the Newark plant in order to equip it as a temporary coffee and tea roasting plant. These items can not be considered as an increased cost of operation or production. Nor were they permanent improvements to the Newark plant, as was held by the Appraisal Section. In our opinion the conclusion of the Appraisal Section is not supported by the evidence. The evidence shows that claimant's Hoboken plant, which was taken over by the Government, was adequate for all of its business and that the Newark plant was acquired solely as a makeshift to be used during the period the Government occupied the Hoboken plant. The Newark plant was wholly unsuited for the purpose to which claimant put it. The walls were so weak that heavy machinery could not be used in it, and the light machinery which was installed caused the walls to vibrate to such an extent that it threatened the collapse of the building. As soon as claimant was reestablished in its Hoboken plant it disposed of the Newark plant and equipment. Claimant actually suffered a loss on the sale of the Newark property, but it is not asking reimbursement thereon.

The only item in this group that is open to criticism is item 26, \$3,220.83, for pay of Jewel Tea Co. employees who supervised the installation of the Newark plant. This item covers the amount paid to the employees from September 7, 1918, to December 28, 1918. Included therein is the pay of Messrs. Bergman, Hedley, Kohl, and Meagher, and Miss Marisicano, amounting to \$2,775. Fifty per cent of this amount is charged against the United States and 50 per cent is charged against claimant, on the theory that one-half of the time of the said employees was devoted to the installation of the Newark plant and one-half devoted to the ordinary business of the Jewel Tea Co. The portion of their salaries which claimant insists is properly chargeable to the United States amounts to \$1,387.50; the balance of the item, amounting to \$1,943.33, represents one-half of the salary of Mr. Eulass, claimant's vice president, during the same period. In view of the fact that one-half of the time of claimant's employees

was devoted to supervising both permanent and temporary improvements at the Newark plant, and the cost of the permanent improvements just about equals the cost of the temporary improvements, it is our opinion that only half of this item should be allowed, to wit, the sum of \$1,610.42.

It is our opinion that all of the remaining items of this group should be allowed. The items of this group allowed are, therefore, as follows:

21. Labor on temporary installation by Huntley Manufacturing Co. employees -----	\$12, 536. 27
22. Miscellaneous fittings and lumber -----	254. 91
23. Preliminary examination of Ford buildings (Chas. Fall) -----	250. 00
24. Architect's services, Ford building (Chas. Fall) -----	830. 00
25. Special plumbing (Williamson) -----	3, 699. 60
26. Pay of Jewel Tea Co. employees supervising installation -----	1, 610. 42
27. Dust collectors (Huntley Manufacturing Co.) -----	1, 120. 00
28. Duplicate telephone service (Bank Street Warehouse) -----	30. 53
29. Special electrical work (Davis) -----	3, 750. 32
30. Special bins, partitions, and other equipment (Young) -----	3, 903. 93
31. Special decorating (Jensen) -----	120. 89
Total -----	28, 106. 87

GROUP II.

2. The items enumerated in this group represent increased cost of operation or production. With the exception of item 122 they represent excess charges which claimant was obliged to pay, which would naturally be added to the cost of production. The Appraisal Section disallowed these items on the theory that they constituted a claim for loss of profits. There is some merit in this conclusion. Increased cost of production means a decrease in profits, but when the total cost of production exceeds the selling price of the article, the result is not only a loss of profits, but a net loss as well. The figures given above, showing the record of operations for 1918 and 1919, show that claimant sustained an actual loss as well as a loss in profits. The Appraisal Section has found that this claim comes within the purview of the act of March 2, 1919, which prohibits the allowance of possible or prospective profits. Claimant has accepted Certificate "C" and the accompanying document setting forth the nature, terms, and conditions of the agreement entered into between the claimant and the United States at the time claimant's plant was taken over by the Ordnance Department. Paragraph 34 of the document accompanying Certificate "C" states that:

"Both prior and subsequent to the serving of the alleged requisition on March 1, 1918, and continuously throughout the negotiations for the property preceding the serving of said alleged requisition and throughout the negotiations for possession of the premises sub-

sequent to the serving of said alleged requisition, various officers and employees of the Ordnance Department made to the claimant Company statements and representations that it would be fully reimbursed by the United States for the removal and restoration expenses and for *all incidental damages* which had been or would be sustained by it by reason of the taking of said property by the United States."

The Appraisal Section found the nature, terms, and conditions of the agreement entered into between claimant and the United States to be as follows:

"39. * * * there arose from the facts and circumstances hereinbefore recited, an informal agreement, expressed or implied as a fact, between the Jewel Tea Co., Inc., and the United States, the nature, terms and conditions of which are that the United States would make just compensation for the use of claimant's property and damages thereto resulting from such use, and *reimburse claimant for such reasonable expenditures and obligations as were made or incurred by said claimant upon the faith of such implied agreement.*"

The act of August 10, 1917, Section 12, is as follows:

"Whenever the President shall determine that the further use or operation by the Government of any such factory, mine or plant, or a part thereof, is not essential for the national security or defense, the same shall be restored to the person entitled to the possession thereof. The United States shall make *just compensation*, to be determined by the President, for the taking over, use, occupation, and operation by the Government of any such factory, mine, or plant, or part thereof."

The promises which the Appraisal Section found were made to claimant by various officers of the Ordnance Department, both prior and subsequent to the service of the requisition for the plant in question, were perhaps broader and more liberal than the compensation authorized by the act of August 10, or than would be authorized by the terms of the agreement which the Appraisal Section has found was actually entered into, as recited in paragraph 39 of the document.

In the opinion of the Appeal Section, the items enumerated in Group II can not be designated as anticipated, possible, or prospective profits, which claimant would have earned. They are items representing expenditures which claimant actually made, which it would not have made if the Government had not taken over its Hoboken plant. These items represent only a small part of the actual losses which claimant has sustained, and are clearly allowable under the act of August 10, 1917, and also are clearly allowable under the terms of the agreement which the Appraisal Section has found to have been entered into between claimant and the United States, as set out in paragraph 39 of the document accompanying the Certificate Form "C." They are also allowable according to established principles of law relating to the taking of private property under the right of

eminent domain. (See *Ehret vs. Schuylkill, etc., R. R. Co.*, 151 Pa. 158.)

With reference to item 122, claimant has been unable to furnish the actual weights of coffee at the time it was unloaded from the boats and the actual weights at the time the coffee was delivered at the Newark plant. The amount of this item is computed by estimating the loss occasioned by the extra handling necessary in getting the coffee from the boat to the Newark plant. Due allowance has been made for the leakage occasioned by the number of handlings which would have been required if the coffee had been placed in the Hoboken plant. This item is therefore for the leakage occasioned by the extra handling. There is no accurate way of determining the exact amount of coffee lost by reason of the extra handling. Considerable testimony was offered by claimant in support of this item, all of which is to the effect that each time coffee is handled there is a necessary loss due to leakage of the coffee from the bags. Some testimony was taken on this item which may be considered as expert testimony. This testimony was to the effect that the average loss, or leakage, from the bags occasioned by one handling of the coffee has been shown by experience to vary from one-half to three-fourth per cent. The amount of this item is computed on the basis of the loss of one-half per cent for each extra handling of the coffee, and there were two extra handlings required in moving the coffee from the boat to the Newark plant. This 1 per cent loss is then computed on the basis of the actual value of the total number of bags placed in the Newark plant. It is the opinion of the Appeal Section that the basis of computing the loss occasioned by extra handling, as above outlined, is fair, and is as nearly accurate as it is possible to determine.

The other items in this group, viz: Items 44, 45, 55, 46, 56, and 47, are supported by bills of lading, receipted bills, etc., establishing the correctness of the amounts of the various items.

It is the opinion of the Appeal Section that each and every item of this Group should be allowed. The various items are as follows:

123. Net charges paid for extra handling from ship to Newark Plant. (Consolidation of former items 41 and 51—green coffee only) _	\$14, 781. 20
122. Incoming green coffee lost by extra handling from ship to Newark plant. (Consolidation of former items 42 and 52) _ _ _ _ _	38, 795. 69
124. Trucking expense through lack of railroad siding at Newark. (Consolidation of former items 43 and 53) _ _ _ _ _	13, 734. 29
44. Increased insurance Newark over Hoboken _ _ _ _ _	13, 291. 04
45. Freight paid on excess weight of green over roasted coffee, prior to September 1, 1919 _ _ _ _ _	1, 496. 34
55. Freight paid on excess weight of green over roasted coffee, period from September 1, 1919, to July 18, 1920 _ _ _ _ _	110. 86

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46. Trucking in Chicago up to September 1, 1919, account lack of capacity Newark plant and resulting necessity of roasting in Chicago-----	\$16, 127. 58
56. Trucking in Chicago from September 1, 1919, to July 18, 1920, account lack of capacity Newark plant and resulting necessity of roasting in Chicago-----	190. 32
47. Demurrage in Chicago through inability to receive heavy shipments caused by speed of removal from Hoboken-----	846. 37
Total -----	99, 606. 87

GROUP III.

3. *Item 91. Engineer's fees on power wiring, \$281.29.*—This item covers engineer's fees on the reinstallation of the power wiring at the Hoboken plant, the same being computed at the customary rate of 5 per cent of the cost of the work, as represented by item 84 of the claim, which was heretofore allowed and paid by the Appraisal Section. This item 91 was the only item allowed by the Appraisal Section in its award of December 31, 1920.

Item 9. Expenses of vice president incident to removal, \$349.85.—This item represents the portion of time devoted by claimant's vice president, Mr. Hancock, in supervising the removal of the machinery and equipment from the Newark plant to the Hoboken plant. In the opinion of the Appeal Section, this item is not a proper charge against the United States. Mr. Hancock was a high-salaried official whose duties with claimant company were general. He undoubtedly devoted a part of his time to the supervising of the removal of the machinery and equipment from the Newark plant and its reinstallation in the Hoboken plant, but we do not feel that this is a proper charge against the United States. Therefore, this item is disallowed.

Item 111. Expense for services of special counsel, \$10,000.—This item represents the fee paid by claimant to Guggenheim, Untermeyer & Marshall, attorneys, for services in connection with the presentation and prosecution of this claim. There is no authority for the allowance of fees paid by a claimant to his attorney engaged in the prosecution of a claim against the United States. This item is, therefore, disallowed.

Item 68. Salary and expenses of employees in preparation and prosecution of claim, \$17,874.34.—This item is self-explanatory, and is very similar to item 111 above. There is no authority for the allowance of expenses incurred by a claimant in prosecuting his claim against the United States. This often results in a considerable hardship to the claimant, but there is no authority for the allowance of such an item, and it is accordingly disallowed.

Item 96. Salary of employees supervising installation, \$1,241.67.—This item was originally \$2,141.67, and represents the prorata part

of the time of claimant's employees engaged in supervising the installation of the machinery and equipment removed from the Newark plant back to the Hoboken plant. It is somewhat similar to item 9 above, which was disallowed. It represents one-half of Mr. Bergman's time for 20 weeks at \$90 per week, a total of \$900 (Mr. Bergman was claimant's supervisor), and the total time for Mr. Hancock for one-half month, amounting to \$1,241.67, including estimated expenses of \$200. The Appraisal Section has already allowed and paid the \$900 represented by Mr. Bergman's time. For the reasons stated above, the Appeal Section is of the opinion that the portion of this item allotted to Mr. Hancock's services should be disallowed.

Item 13. Loss by purchase of lease on Ford Building, \$9,177.66.—This item is explained in the statement of facts. In our opinion claimant exercised its best business judgment in acquiring the Ford Building in order to continue its business. The testimony is conclusive that claimant made every effort to secure a suitable building, and that the one it did secure was the most suitable it was possible to secure. In order to get immediate possession, it was necessary for claimant to acquire the unexpired portion of the lease on this building. The amount paid would indicate that the lessee forced claimant to pay more than the value of the lease, but there was nothing else for claimant to do. This item represents a complete loss to claimant, and in our opinion is properly allowable.

Item 4. Freight charges from Hoboken to Chicago and elsewhere on outgoing merchandise and equipment, \$19,143.70.—This item is explained in the statement of facts. A repetition is unnecessary. This item, as originally filed, was for \$60,686.75, and this latter figure included the freight charges on coffee shipped from the Hoboken plant at the time it was commandeered in order to empty it. So much of the original item as represents the freight charges on merchandise in the Hoboken plant at the time it was commandeered has been allowed and paid by the Appraisal Section. The amount disallowed, \$19,143.70, is the freight on shipments of coffee which had already been ordered, but which arrived after the Hoboken plant was taken over by the Government. In our opinion there is no reason for making a distinction with reference to these shipments. Therefore the balance of this item, the sum of \$19,143.70, is allowed.

The items of this group which are allowed are as follows:

91. Engineer's fees on power wiring-----	\$281. 29
13. Loss by purchase of lease on Ford Bldg., as necessitated by pressure to vacate Hoboken plant-----	9, 177. 66
4. Freight charges from Hoboken to Chicago and elsewhere on outgoing mdse. & equipment-----	19, 143. 70
Total-----	<u>28, 002. 65</u>

DISPOSITION.

The Appeal Section, War Department Claims Board, hereby transmits a copy of this decision to the Appraisal Section, War Department Claims Board, for appropriate action in accordance with this decision.

Lieut. Col. McKeeby and Capt. Woodfin concurring for the Appeal Section: Col. Morrow concurring for the War Department Claims Board.

APRIL 7, 1921.

Case No. 3042.

In re CLAIM OF UNITED STATES INDUSTRIAL CHEMICAL CO.

1. **CONTRACTS, SUSPENSION, ORAL AGREEMENT OF—ACT OF MARCH 2, 1919.**—An oral agreement for the suspension of a contract for the manufacture of chemicals entered into prior to the armistice in order that the Government might obtain the chemicals at a less price from other sources is not an agreement within the purview of the act of March 2, 1919, as it is not for a purpose connected with the prosecution of the war.
2. **SETTLEMENT CONTRACTS—FAILURE OF BUREAU BOARD TO APPROVE, EFFECT OF—METHOD OF ADJUSTMENT.**—A settlement agreement providing for the termination of a contract for the manufacture of chemicals, though signed by the contractor and a representative of the Government, does not give the contractor any vested rights until finally approved by a bureau board, where the settlement contract provides that it shall have no binding effect until approved by the bureau board. Under such circumstances the suspended contract should be adjusted under the supply circulars.
3. **CLAIM AND DECISION.**—Claim for \$91,589 under the act of March 2, 1919, for damages on account of the suspension of a contract for the manufacture of methyl acetate. Held as stated in the above syllabus.

Lieut. Col. Smith writing the opinion of the Board.

STATEMENT OF FACTS ON RECONSIDERATION.

1. This is an appeal from the decision of the Air Service Section, War Department Claims Board, on a claim for the sum of \$91,589.00 on account of the suspension of a formally executed contract.

Claimant's appeal is because of the refusal of the Air Service Section, War Department Claims Board, to approve a formal settlement contract, dated April 18, 1919 (3704-A), and also because the settlement offered by the Air Service in lieu of its approval of the settlement contract is less in amount than claimant believes that it is entitled to.

2. Upon appeal claimant makes the following contentions:

(a) That the settlement contract should be approved.

(b) That if the settlement contract is not approved then claimant is entitled to the same relief under the act of March 2, 1919, because of an alleged oral agreement under which the original contract was suspended and upon which the settlement contract is based.

(c) That if relief be not allowed under either of the methods above suggested that claimant is entitled to be made whole on the transaction.

3. Article II of the contract provides inter alia:

"The Contractor agrees that it now has or will provide with the utmost dispatch, at the best prices obtainable:

* * * * *

"(3) Such labor, material, supplies and the like, as may be necessary to enable the methyl acetate to be made and all the requirements of this contract to be met, * * *"

4. Claimant is a manufacturer of chemicals at Curtis Bay, South Baltimore, Md. It entered into contract No. 3704, dated April 18, 1918, with the Government, by which it was agreed that claimant would manufacture for and deliver to the Government not less than 1,920,000 pounds and not to exceed 2,160,000 pounds of methyl acetate. The price to be the actual cost of production plus 10 per cent, plus 0.5 of a cent per pound to cover depreciation of claimant's plant employed especially in the performance of the contract, and the further sum of 0.4 of a cent per pound for additional equipment and facilities, provided, however, that the total cost should not exceed an average price of 28 cents per pound for all methyl acetate delivered to the Government f. o. b. contractor's plant, the total amount to be paid for 2,160,000 pounds not to exceed \$604,800.00 (Art. IV). Among the items of cost to be included is 0.5 of a cent per pound for claimant's general administrative or main office expenses. (Testimony shows this to include the New York overhead.) (Par. 4, Art. V.)

5. Article III provides in part as follows:

"The Contractor agrees to deliver the said methyl acetate herein contracted for during the remainder of the year 1918 as far as possible in equal lots and as regularly during the year 1918 as the Contractor is able under the conditions of process and operation and as nearly as possible at the rate of one hundred and twenty (120) tons a month for the months of May to December, 1918, both inclusive, and the Contractor further agrees to deliver in addition during the month of April, 1918, such amount not exceeding one hundred and twenty (120) tons, of said methyl acetate as it possibly or conveniently can. Inasmuch as speed of production is vital to the best interests of the Government and the People of the United States, the Contractor agrees to give the performance of this contract precedence over all other work for parties other than the Government and the Contractor also agrees to use every effort to perfect its plant and process as speedily as possible and to bring about a capacity production which shall accomplish the delivery of said methyl acetate in regular and uniform quantities and installments."

6. Article XXI of the contract provides that the Government may terminate the contract at any time within 30 days after December 31, 1918, by notice in writing to the contractor.

7. Article XXIII is as follows:

“ CANCELLATION IN EVENT OF CESSATION OF HOSTILITIES.

“ARTICLE XXIII. In the event of the cessation of hostilities on the part of the Government or the signature by the Government of a general armistice bringing the participation of the Government in the present war to a close, the Government may at its option terminate this agreement by a written notice to the Contractor. Such notice shall terminate the agreement upon its receipt by the Contractor. In the event of such termination, the Government shall pay the unpaid purchase price of any methyl acetate then actually manufactured and accepted or ready for acceptance hereunder and conforming to the requirements of this agreement, and the Government shall also pay the Contractor a sum sufficient to indemnify the Contractor against actual net expenditures and actual net outstanding obligations made or incurred for labor and materials with respect to the methyl acetate not then manufactured and accepted or ready for acceptance. The Government shall also pay the Contractor any unpaid portion of the sum necessarily expended for additional equipment and facilities as contemplated by subdivision (4) of Article IV hereof and upon said payment such equipment and facilities shall become the property of the Government as provided therein. The Contractor shall do everything in its power to reduce the amount of the Government's obligations arising from such termination and for the purpose of determining the amount of the Contractor's net outstanding obligations and liabilities and shall credit the Government with the fair value of any salvage from materials or equipment purchased for the performance of this contract and designed to be charged as a part of the cost thereof but which have not at that time become the property of the Government.”

8. The contract is executed on behalf of the Government: “A. C. Downey, Signal Corps, U. S. A.,” and is approved “By authority of the Chief Signal Officer (authorization July 11, 1917), H. S. Brown, Major, Signal Corps.”

9. Contract No. 3704 was supplemented by contract No. 3704-1, dated May 13, 1918, a tripartite agreement between claimant, the Government, and His Britannic Majesty's Government, signed on behalf of the Government by A. C. Downey, Major, Signal Corps, U. S. A., and approved on behalf of the Secretary of War by the Chief Signal Officer over the signature of H. S. Brown, Major, Signal Corps. The supplemental contract provides that claimant shall sell to the British Government, and may sell to such other persons or corporations as the United States may designate, such quantities of the methyl acetate referred to in contract No. 3704 as the United States may specify from time to time, such sales reducing pro tanto the quantity of methyl acetate to be furnished under contract No. 3704. By the supplemental contract the contract of April 18, 1918, was ratified and confirmed, except as expressly modified by the contract of May 13, 1918.

10. Claimant's chemical plant included a plant which had been erected for and devoted to the manufacture of esters, of which methyl acetate is one (R. 29), although claimant had not previously manufactured methyl acetate. It had, however, manufactured acetone in its ester plant for the British Government prior to the entry of the United States into the war. Claimant had begun remodeling its ester plant so as to produce esters commercially. The Air Service, learning that claimant was changing its plant, requested that it be modified so as to produce methyl acetate. (R. 29.) Methyl acetate was not a commercial product. (R. 36.)

11. The supply of acetic acid generally used in the manufacture of methyl acetate was limited, and prior to the date of the contract claimant had begun experimenting with calcium acetate as a substitute for acetic acid. These experiments were being carried on with the knowledge of the Air Service before claimant obtained the contract, though the process had not been perfected when the contract was executed. (R. 50.)

12. In the beginning of production claimant used dry calcium acetate, and with the consent of the Air Service changed to calcium acetate in solution (R. 51), known as heavy liquor (R. 52), in order to conserve dry calcium acetate (R. 53).

13. In the manufacture of the methyl acetate claimant used some ingredients which it had on hand prior to the signing of the contract, such as calcium acetate solution, soda, soda ash, and lime. (R. 40.)

The calcium acetate produced by claimant was more expensive than that produced by the ordinary method as a by-product of wood distillation. The War Department had consumed all of this chemical resulting from wood distillation and required more calcium acetate. It was fully understood in producing calcium acetate otherwise than by the wood-distillation method that the cost of calcium acetate would be higher. (R. 54.) The Government had fixed the price on dry calcium acetate at 4 cents per pound. The calcium acetate produced by claimant cost it about 7.7 cents per pound; in solution the cost was a fraction of a cent less. (R. 55.)

14. Claimant began to produce methyl acetate by the use of dry calcium acetate. Subsequently it used calcium acetate in solution, and by the time the contract was suspended, September 11, 1918, claimant had developed a process for producing free acetic acid, which it expected to use in lieu of the calcium acetate. By that time the demand for acetic acid generally had decreased until there was a surplus in the country and acetic acid was available for use in producing methyl acetate, and it was then possible for claimant to purchase acetic acid cheaper than it could be produced in its own factory. (R. 56-57.)

15. Dr. M. C. Whitaker, president of claimant's company, a chemist of much experience and a former professor of chemistry in Columbia University, New York City, who, during the war, gave his services freely to the War Industries Board without compensation, testified that in agreeing to the price of 28 cents per pound—

“It was contemplated that the initial production would probably cost a good deal more than that; we would get it ironed out along toward the tail end of the production. That is the history of every new production of this sort.”

16. Mr. Carl Haner, jr., a chemical engineer, employed by claimant as its superintendent, testified that all the raw materials charged for in the claim were used in the production of the methyl acetate delivered. He testified that during the month of December, 1917, and the months of January, February, March, April, and May, 1918, the high cost of production amounting to about 70 cents per pound, was due to test runs made to determine the equipment necessary to fill the contract. (R. 65.) He testified that during the month of September, 1918, the low cost of about 13 cents per pound was due to economies of manufacture and “to clean up of some of the materials that we had.” He testified that the high charge of \$1.50 per pound in October was due to the clean up and practically no production. One hundred twenty-four thousand, five hundred and eighty pounds of methyl acetate were produced in September and only 2,764 pounds in the month of October. Claimant ceased putting raw material in process September 12, 1918. (R. 69.)

17. Mr. Arthur A. Backhaus, a graduate chemical engineer in the employ of claimant, testified that he was in charge of the development of a method for producing glacial acetic acid and that he and his assistants worked on this problem for about a year prior to the signing of the contract, but that by the time the process was fully developed a supply of acetic acid was available at such price that it was economy to use it in the manufacture of methyl acetate rather than the glacial acetic acid that claimant was able to produce by its new process. No charge is made, however, for the experimental work in connection with the production of the glacial acetic acid. (R. 75.)

18. Dr. Whitaker testified that if claimant had been permitted to continue production under its contract it would have completed the contract within the allotted time at a profit. (R. 113.) He submitted figures upon which he based this statement. His estimate of the average cost to claimant of producing the unfulfilled portion of the contract was 23.706 cents per pound. He estimated the average cost of producing the entire amount of methyl acetate contracted for at 27.3944 cents per pound. He explained the high cost per pound prior to May 31 as due to the small-scale operations with high operat-

ing costs and low production. (R. 114 and 115.) He testified that after the initial try-out runs in December there was nothing done during January and February on account of the necessary equipment being installed. Dr. Whitaker also testified that the specifications for the methyl acetate were not agreed upon until about the time of the contract, and that, therefore, the methyl acetate produced prior to May 31, 1918, did not in all cases meet the specifications and required additional treatment. (R. 117.) He explained that prior to December he knew that he was to have a contract for the manufacture of methyl acetate. (R. 122.)

19. The contract provided for the delivery of approximately 120 tons a month. Claimant's greatest production was approximately 75 tons per month, and even at that rate claimant was having difficulty in getting the Government to take the methyl acetate as fast as claimant produced it. (R. 124.) The Government had overpurchased methyl acetate. (R. 124.)

20. Mr. William W. Haughey, a representative of claimant company, was sent to Washington to try to get shipping orders on methyl acetate. About August 10, 1918, he consulted with representatives of the Chemical Section, War Industries Board, and with the Bureau of Aircraft Production, Signal Corps. (R. 138-140.) At this time he was advised that no further orders for methyl acetate would be given by the United States before October, and was advised to get in touch with a representative of the British Government. He was informed by the representative of the British Government that it did not desire any more methyl acetate. Mr. Haughey advised Mr. Arnold, of the Bureau of Aircraft Production, to that effect; and at a conference, at which Mr. Arnold, Mr. Bamberger, and Lieut. Dohr were present, either Mr. Bamberger or Lieut. Dohr asked Mr. Haughey if his company would consider canceling the contract. (R. 139.) Mr. Haughey thereafter consulted with Dr. Whitaker and was directed by him to say to the Signal Corps that if they could not use any more methyl acetate claimant would consider cancellation "providing we were let out whole." (R. 140.) Mr. Arnold, of the Bureau of Aircraft Production, told Mr. Haughey that he would take the matter up and let claimant know. Mr. Haughey wrote a letter, dated July 31, to Dr. Whitaker. This letter is marked claimant's Exhibit No. 7. (R. 262.) About September 1, Mr. Haughey asked Mr. Arnold what he was going to do about the methyl acetate, and Mr. Arnold advised him that he was going to write Dr. Whitaker. (R. 144.) On September 3, 1918, Mr. Haughey wrote Dr. Whitaker (Cl. Ex. 8, R. 262) that Mr. Arnold had told Mr. Haughey "that he was writing you (Whitaker) suggesting that the contract be canceled."

Shortly after September 3, Dr. Whitaker had a conversation with Mr. Arnold in Washington, in which Mr. Arnold told Dr. Whitaker that the Air Service—

“Had more methyl acetate than they were going to need on the present reduced air program, and that they could buy it cheaper from other producers, made by other processes, and that if we would consider a reasonable proposition for cancellation they would like to cancel.”

Dr. Whitaker advised Mr. Arnold that he had no desire to—

“Be exacting about the contract, and that if they would want to cancel on condition that they make us whole for our outlay and losses and so forth, I thought that was the proper thing to do.” (R. 147.)

Mr. Arnold first proposed a settlement which would have made a resultant loss to claimant of about \$30,000. (R. 148.) Dr. Whitaker promptly refused this settlement. Then Mr. Arnold told Dr. Whitaker that he would make an appointment to see Col. Downey and Mr. Shea. (R. 149.) A conference was had in Col. Downey's office, at which Mr. J. B. Shea, Col. Downey, Mr. Arnold, and Dr. Whitaker were present. At this conference Dr. Whitaker submitted a proposition the effect of which was to let claimant out “whole.” At this conference Mr. Shea suggested that their records showed claimant was “out of pocket about \$30,000, and that they would be willing to cancel on the basis of splitting that loss fifty-fifty.” (R. 150.) Dr. Whitaker declined to submit that proposition to his board of directors and reiterated his proposition that the only basis of settlement which claimant would agree to was “that we be let out whole.” After a secret conference between Mr. Shea, Col. Downey, and Mr. Arnold, Col. Downey stated that they would advise claimant on September 11 what the Air Service was willing to do in the matter. (R. 151.)

21. On September 11, Mr. Shea called Dr. Whitaker over the telephone and advised him that they had decided to accept his proposition and cancel the contract on that basis. (R. 152.) Dr. Whitaker made a memorandum of this telephone conversation at the time. The memorandum made by him is as follows:

“ METHYL ACETATE CONTRACT.

“ Mr. Shea stated their willingness to settle and cancel the contract on the following basis:—

- “(1) Payment in full for the total cost of production;
- “(2) Payment for the actual cost of increased facilities, less equipment credited;
- “(3) Proportion of the New York overhead chargeable over the time through which the contract has run;

"(4) Proportion of depreciation over the time through which the contract has run;

"(5) No allowance for profits.

"Note: The memorandum before Mr. Shea and myself at the time of the telephone conversation is a copy of the status of costs and expenditures to August 31, 1918.

"It was understood that the manufacturing operations would be suspended as soon as, in our judgment, the clean-up could be completed.

"It was understood that a statement reflecting the actual figures covered by the above points, should be prepared by our auditors in cooperation with the government auditors, up to and including the end of the operation.

MCW." (Cl. Ex. No. 5, R. 257.)

22. On the following day Dr. Whitaker wrote a letter to Col. Downey (Cl. Ex. No. 4, R. 257), in which he inclosed a copy of this telephone memorandum and also a copy of a letter of that date which he had written to his plant superintendent, Mr. Carl Haner, jr. (Cl. Ex. No. 6, R. 259), the latter letter confirming instructions Dr. Whitaker had given Mr. Haner the previous day over the telephone. The letter to Col. Downey is as follows:

"Col. A. C. DOWNEY,
Office of the Chief Signal Officer,
Washington, D. C.

"DEAR SIR:

"Upon receipt of the telephonic instructions from Mr. Shea we immediately communicated with our plant in regard to suspension of Methyl Acetate production under our contract with the Signal Corps. These instructions have been confirmed as per enclosed copy.

"We will advise your office as soon as the manufacturing operations have been cleaned up and the auditors have rendered a statement of accounts.

"Thanking you for your courtesy—

"Very truly yours,

"President."

The letter to Mr. Haner, inclosed in the letter to Col. Downey, is as follows:

"Mr. CARL HANER, Jr.,
Superintendent U. S. Industrial Chemical Company,
South Baltimore, Md.

"DEAR HANER:

"This is to confirm my telephoned instructions to the effect that the Government desires to have us discontinue the manufacture of Methyl Acetate and cancel the contract. Telephoned instructions to this effect were received last night from Mr. Shea of Colonel Downey's office.

"It is their desire that we discontinue manufacturing operations, clean up all of the Methyl Acetate now in process, recover any un-

manufactured materials now in intermediate stages and return them to stock, segregate all finished Methyl Acetate into drums or tanks, have it inspected and accepted, have both finished products and raw materials inventoried and checked by Government representatives, and report operating figures to the Accounting Department.

"As soon as the operating figures are all in our auditors will proceed, in cooperation with the plant accounting officers, to prepare a statement which will be used as a basis of settlement for the contract. Lieutenant Hutson will be advised by the Washington Office to cooperate with our auditors in compiling the figures and closing out this transaction. You in turn should keep Mr. Flynn advised as to the progress of the plant clean-up.

"It is our desire to bring about the result indicated above at the earliest possible date but without the loss of any raw material, finished Methyl Acetate and without any unnecessary expense.

"Very truly yours,

"(Signed)

M. C. WHITAKER,
"President."

Claimant put no materials in process after September 12, and finally suspended work on the contract about October 20, 1918.

23. A memorandum from Mr. Shea to Lieut. Col. H. S. Brown, dated December 5, 1918, was introduced in evidence marked Claimant's Exhibit No. 10. (R. 264.) This memorandum is an analysis of Mr. Shea's understanding of the telephone conversation between Mr. Shea and Dr. Whitaker on September 11. The statement of Mr. Shea was prepared in the presence of Dr. Whitaker for the purpose of making certain the understanding growing out of the telephone conversation. The only difference between Mr. Shea and Dr. Whitaker as to this conversation was as to Items Nos. 3 and 4, with reference to the New York overhead. Dr. Whitaker understood that the New York overhead was to be calculated on the basis of time, and Mr. Shea understood it to be calculated on the basis of poundage produced. Dr. Whitaker, realizing that there was but a slight difference in amount resulting from these different methods of calculation, consented to the interpretation of Mr. Shea. So that, as a matter of fact, there is and was after December 5, 1918, no difference as to the terms of the telephonic conversation. In other words, the memorandum made by Dr. Whitaker of the telephone conversation with Mr. Shea states the conversation as both Dr. Whitaker and Mr. Shea understood it, with the exception as to the method of calculating the New York overhead, and as to this method of calculation Dr. Whitaker afterward, and on December 5, consented that the understanding be in accordance with Mr. Shea's interpretation. (R. 176 to 182, inclusive.)

24. In Claimant's Exhibit No. 11, a memorandum from Mr. Shea to Capt. Ewing, dated September 12, 1918, it is stated:

"It is the belief of this office that he (referring to Dr. Whitaker) is incorrect in this figure, and accordingly in the telephone conversa-

tion with Dr. Whitaker in which the actual cancellation was confirmed, the writer stated to Dr. Whitaker that he would be willing to cancel upon the basis of the figures made up in Colonel Downey's office, but he would not be willing to cancel if the amount was going to run very much higher, and followed that up with the statement that he would not be willing to cancel if the amount of the cancellation should run to over \$50,000."

Dr. Whitaker explained that Mr. Shea stated that they did not expect the figure to run over \$50,000, and that that was the limit that they proposed to place on the settlement. Dr. Whitaker replied that he would not consent to such limitation, "that our proposition was based primarily upon our getting out whole," and after a few minutes' silence Mr. Shea said "All right, go ahead." (R. 183.)

25. Claimant expedited the clean-up process and closed down its plant at the earliest possible moment (R. 186), the date of final shut-down being October 20, 1918. (R. 188.) Shortly after October 20, 1918, Government auditors began work in checking up the accounts for the purpose of preparing a report. This report is dated about November 18 or 19. (R. 188.)

26. The understanding was that a settlement contract would be prepared in accordance with the understanding over the telephone, as soon as claimant had cleaned up properly the materials in process and an audit had been made by the Government. (R. 185.) A settlement contract, however, was not entered into until April 18, 1919.

27. Claimant produced 686,176 pounds of methyl acetate. This acetate was delivered to and accepted by the Government and has been paid for on the basis of 28 cents per pound, a differential of 3 cents per pound having been retained by the Government subject to final audit. Claimant, therefore, has only actually received 25 cents per pound for the acetate delivered. A portion of the acetate so produced was delivered to His Britannic Majesty's Government under the supplemental agreement of May 13, 1918. Five hundred and fifty-eight thousand eight hundred and thirty-two pounds were produced prior to September 1, 1918, and 683,412 pounds were produced prior to October 1.

28. At the time the contract was entered into, and at all times thereafter until its suspension, the standard price of methyl acetate, as fixed by the Government, was 21 cents per pound.

29. A written settlement contract, No. 3704-A, dated April 18, 1919, was executed by claimant and signed on behalf of the Government by F. S. Schnacke, Captain, A. S. A. P. This contract provides for the termination of contracts 3704 and 3704-1, and that in consideration thereof the Government will pay claimant \$91,589. Article V of this contract provides that it "shall not become a valid and binding obligation on the Government unless and until the same has been duly approved by the Claims Board for the Air Service." This

settlement contract was presented to the Claims Board, Air Service, and was conditionally approved by it July 3, 1919. The order of approval recites that it is the intention of Lieut. Col. E. A. Clark to take the matter before the Standing Committee of the War Department Claims Board for final approval. The War Department Claims Board refused approval and referred the matter back to the Air Service Section, which Section on October 23, 1920, rescinded the tentative approval of the Claims Board, Air Service, and offered claimant a settlement contract in the sum of \$28,018.18, which proffered settlement contract claimant declined to enter into, and appealed to the Appeal Section, War Department Claims Board.

30. In arriving at the amount which it offered claimant, \$28,018.18, in lieu of approval of the settlement contract, the Air Service Claims Board took into consideration and allowed claimant 3 cents a pound differential on the methyl acetate delivered, in order to bring the payment up to the contract price of 28 cents per pound. The allowance offered also included raw materials in the sum of \$2,425.50, and the unamortized proportion of special facilities, \$2,744.93, and deducted \$882 for salvage on the raw material. The Air Service Claims Board based its findings upon the plant accounting officer's report of May 14, 1918, as to the items allowed. (R. 190.)

31. Prior to May 31, 1918, claimant's average cost of producing methyl acetate had been about 70 cents per pound. The cost of manufacture for the approximate period of five months prior to final suspension was as follows:

In June.....	\$0. 29
In July .....	. 32
In August.....	. 29
In September.....	. 13
In October	1. 55

32. Claimant might have delivered 2,160,000 pounds of methyl acetate. It delivered only 686,176 pounds, leaving 1,473,824 pounds undelivered. Claimant would have received for the undelivered portion, had it been delivered, approximately \$412,670.72. By canceling the contract the Government could have purchased a quantity of methyl acetate equal to the undelivered portion for 21 cents per pound, or \$309,503.04, and thus saved \$103,053.68. The saving would have been even greater than this, for in all probability, as it was then overstocked on methyl acetate, the Government would not have made such a purchase.

33. By the testimony of Dr. Whitaker it is established that had the contract not been suspended claimant would have made a net profit on the transaction of approximately \$13,000. (R. 114.)

34. Claimant had on hand and under commitment a sufficient amount of material to have completed the contract.

DECISION.

1. The contentions of claimant will be considered in the order named:

(a) That the supplemental-settlement contract of April 18, 1919, should be approved;

(b) That if the settlement contract be not approved that claimant is entitled to recover upon the oral agreement upon which the settlement contract is based under the Act of March 2, 1919;

(c) That claimant is entitled to be made whole on the transaction.

2. (a) *That the supplemental settlement contract of April 18, 1919, should be approved.*—The written contract of April 18, 1919, specifically provides that it “shall not become a binding obligation upon the Government unless and until the same has been duly approved by the War Claims Board, Air Service.” The Air Service Claims Board approved the contract July 3, 1919, in effect subject to the approval of the War Department Claims Board. The latter Board refuses to confirm the contract, and upon the claim being returned to the Air Service Section, that Section, on October 23, 1920, rescinded the tentative approval of the Air Service Claims Board of July 3, 1919, and offered claimant a settlement in a less sum, thus leaving the settlement contract unapproved.

Under these circumstances it can not be said that claimant has any vested rights under the supplemental contract of April 18, 1919. Such contract has been in in fieri since it was signed by claimant and a representative of the Government and has not yet ripened into a binding obligation, as it has not been approved by the Air Service Claims Board. The parties themselves agreed that the settlement contract should have no binding effect until approved by the Air Service Claims Board—now the Air Service Section. That Section having finally declined approval of the contract, it is as though the contract had not been written. Hence, this Board can neither direct its approval, nor require payments to be made thereunder.

3. It was in the interest of the Government to cancel the original contract, as a saving to the Government of \$103,053.68 thereby resulted. As a result of the suspension agreement entered into at the Government's request, claimant changed its position and gave up a prospective profit of some \$12,000 or \$13,000. There is no evidence in this case of fraud or unfair dealing on the part of either the claimant or the Government, and there is no showing that the Air Service was ignorant of the facts upon which the settlement contract is based. It is clear that every fact was known to both parties, and that the settlement transaction was unaffected by taint or infirmity. Under the record in this case the equities appear to be with the claimant in regard to its contention that the settlement contract ought to be ap-

proved. As was said by the Court of Claims in the Corliss case, 10 Court of Claims, 494, L. C. 502—

“When the Government assumed the position of a contractor with a citizen, it comes under all the obligations and liabilities of an individual, and must abide by its own acts and agreements, with the added obligation, because it is a government and more powerful than any individual, to deal with the individual in the strictest fairness and justice. It is to hold the Government to its contract with the citizen, and to give the latter full redress for any breach of such contracts, that this court was established.”

However, it is not within the jurisdiction of this Section, nor is it the purpose of this Section to interfere with the discretion vested by the contract in the Air Service Section. It might be remarked, however, that had the formal supplemental contract been prepared and executed prior to the Armistice, it is quite possible that the clause which requirest the approval of the Claims Board for the Air Service would not have been inserted therein, and that the matter would not have found its way either to the Air Service Section or to this Section, for consideration.

It is not too late, even now, for the Air Service Section, if it so desires, to reconsider its previous action, and if it believes that the settlement contract is in the interest of the Government and would effect a just and equitable settlement, to approve the contract and thus give it vitality.

4. (b) *That if the settlement contract be not approved that claimant is entitled to recover upon the oral agreement upon which the settlement contract is based, under the act of March 2, 1919.*—Claimant is not entitled to relief under the verbal agreement. Such agreement does not come within the purview of the act of March 2, 1919, as it is not for the acquisition or use of lands, “or for the production, manufacture, sale, acquisition or control of equipment, materials or supplies, or for services, or for facilities, or other purposes connected with the prosecution of the war.” The fact that the adjustment of the original formal contract and the suspension of work thereunder released funds set aside to pay for the methyl acetate to be manufactured under that contract, in order that such funds might be used to purchase methyl acetate elsewhere at a less price, can not be said to be for a purpose connected with the prosecution of the war, within the meaning of the act of March 2, 1919.

5. Even if independently of the Dent Act, claimant would have had any rights which it could have enforced under the verbal agreement for suspension, it waived these rights when it entered into the formal supplemental contract, providing that it should not become a binding obligation until approved by the Air Service Claims Board. If this settlement contract were void, then perhaps any rights under the

verbal contract would be revived; but the supplemental contract is not void, it simply has not been fully executed, as it lacks the approval of the Air Service Section, a necessary prerequisite to its becoming a binding obligation. Hence, the verbal understanding upon which it is based is not revived, and claimant's second contention must be disallowed.

6. (c) *That claimant is entitled to be made whole on the transaction.*—Only two contingencies for the termination of the contract are provided for in it: (1) That the Government may terminate the contract within 30 days after December 31, 1918, by a notice in writing as to all methyl acetate contracted for, as shall not have been delivered during the calendar year of 1918. (2) The other contingency is the cessation of hostilities. The contract was suspended, but not on account of either of such conditions. It was suspended because the Government realized that it was under obligation to pay claimant more for methyl acetate produced by it than it could purchase methyl acetate for from other concerns, and because the Government had overpurchased methyl acetate. No method of settlement is provided for under Article XXI relative to termination of the contract within 30 days after December 31, 1918.

7. As to the second contingency for termination of the contract—cessation of hostilities—there is a method of settlement provided for in Article XXIII. This article simply provides that the Government shall pay the unpaid purchase price of the methyl acetate which may be accepted by the Government and a sum sufficient to indemnify the contractor against the actual net expenditures and obligations incurred for labor and materials, with respect to undelivered methyl acetate, and for the payment of any “unpaid portion of the sum necessarily expended for additional equipment and facilities as contemplated by subdivision 4 of Article IV hereof.”

If the contract had been suspended because of the cessation of hostilities, Article XXIII would control the method of settlement—because it is so written—without regard to whether a settlement made pursuant to it would be a fair and equitable one.

8. The Claims Board for the Air Service was in error in tendering claimant a settlement based on the method provided in Article XXIII, because the contract was not suspended under circumstances which make that method of adjustment applicable, and because also a settlement arrived at by the method provided in Article XXIII would not make claimant “whole” or result in a fair and equitable settlement. It ignores the fact that claimant in the later stages of production could have recouped its losses in the beginning and completed the contract at a profit.

9. It is the purpose of the War Department, always, in offering a settlement contract to a contractor whose contract has been sus-

pendent to see to it that the contract offered will result in a fair and equitable adjustment of the contract. Pursuant to this policy, prior to the Armistice, and on November 9, 1918, the War Department promulgated Supply Circular No. 111. This circular is as applicable to the adjustment of contracts suspended prior to its promulgation as it is to contracts suspended thereafter. There is no limitation in this respect in the supply circular, and none was intended. This circular, then, should be looked to for a method of adjustment in this case. It declares rules of procedure which the Government believed to be fair, and which time has demonstrated are fair both to the Government and the claimant.

10. Claimant is in the unfortunate position of having fulfilled its part of the oral suspension agreement of September 11, 1918, by stopping production, and yet of not being able to enforce that agreement against the Government. It is equally unfortunate in being unable to compel the approval of the written settlement contract of April 18, 1919, into which the oral agreement was merged. There is, however, upon the Government and its various representatives who have to deal with the adjustment to be made under this contract, a moral obligation—an obligation of common fairness such as grows out of the words of honest men dealing with each other—to see to it that, in so far as it is possible by application of the rules laid down in Supply Circular 111, an offer of settlement be made claimant such as was within the intent and understanding of Mr. Shea and Dr. Whitaker as evidenced by the memorandum of the telephone conversation made by Dr. Whitaker as amended by subsequent agreement between him and Mr. Shea as to the application of the New York overhead according to poundage rather than as to time.

11. The facts surrounding the suspension of this contract, as well as those attending the signing in good faith of the settlement contract of April 18, 1919, make this claim one in which the application of the last paragraph of subparagraph (5), paragraph 3, Supply Circular 111, is peculiarly appropriate. The files of this Section may be searched in vain for circumstances which made more fitting the application of the subparagraph above referred to.

12. Claimant is entitled to an allowance of all of its actual costs incurred in the preparation to manufacture 2,160,000 pounds of methyl acetate and to its actual cost in producing the poundage of methyl acetate which has been delivered to and accepted by the Government, without regard to the price per pound of 28 cents fixed in the contract. The contracting parties understood, as indicated by the use of the words "average price" in Article IV of the contract, that the cost per pound in the early stages of the contract as well as in the cleaning up process incident to suspension might exceed 28 cents.

13. Certain experimental expenses incident to the production of methyl acetate incurred prior to the actual signing of the contract are included by claimant as a part of its actual cost of manufacture.

The record is clear and uncontroverted that these experimental costs incurred by claimant prior to the execution of this contract were incurred under the instruction and directions of Mr. Lockhart, of the Raw Materials Division, Bureau of Aircraft Production, in an effort by the claimant to evolve a new method for producing methyl acetate, in order to conserve the supply of acetic acid, of which there was a scarcity at that time and for which there was great demand in other phases of war industries.

It is undisputed that these experiments, beginning in December, 1917, continued with a large force of chemical experts up to the signing of the contract and the beginning of production.

The cost of this experimental work is clearly a part of the necessary preparation for production under the contract, was incurred on the faith of such agreement, and is an item of actual cost properly reimbursable to claimant. (Memorandum No. 22, Sept. 15, 1919, Board of Contract Adjustment, 1st Ind., War Department Claims Board.)

14. In determining the actual cost, including the experimental expense above referred to, claimant is entitled to an allowance for all cost of labor used in production, the cost of all materials and supplies entering into or expended in the production of methyl acetate, together with a fair proportion of the general plant expense incident to the performance of the contract or incurred upon the faith of the contract. Article V of the contract defines the term "general plant expense," and this definition must control.

15. As has been said, the contract was suspended at the request and in the interest of the Government, and claimant in good faith believed that a method of settlement had been agreed upon between it and the Government prior to suspension, and until the Government offers claimant a settlement in keeping with the Government's ideas of fairness and equity as outlined in Supply Circular 111, it has not discharged its obligation to the contractor.

Disposition.

The Appeal Section, War Department Claims Board, hereby transmits its decision to the Air Service Section, War Department Claims Board, for action in accordance with the foregoing decision.

Lieut. Col. McKeeby and Capt. Frazer concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

APRIL 7, 1921.

Case No. 3068.

In re CLAIM OF BAHAMA AGRICULTURAL & TRADING CO (LTD.).

1. Where the formal contract is executed after the suspension of a verbal agreement, and solely for the purpose of enabling the contractor to present a claim against the United States, such a formal contract is void for want of consideration.
2. Claimant is entitled to reimbursement for reasonable expenditures necessarily incurred upon the faith of a verbal agreement under the act of March 2, 1919.
3. EXPENDITURES MADE BEFORE AN AGREEMENT WAS ENTERED INTO.—Where a prospective contractor makes expenditures before an informal agreement is entered into, such expenditures can not be reimbursed, as they were not made upon the faith of the agreement subsequently entered into.
4. STATUTE OF FRAUDS.—Where a contractor enters into an agreement for personal services extending over a period of more than 12 months, such an agreement is within the Statute of Frauds. If the contractor pays the employee the difference in salary between what the employee would have earned during the term of employment and what he did earn after he was discharged, such an expenditure was not necessary and can not be reimbursed under the act of March 2, 1919.
5. CLAIM AND DECISION.—Appeal from award of Air Service Section. Held, claimant entitled to reimbursement for reasonable expenditures necessarily incurred upon the faith of the informal agreement, but not under the formal agreement.

Capt. Taylor writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim is before the Appeal Section, War Department Claims Board, on appeal by claimant from an award in the sum of \$2,189.55, made by the Air Service Section February 1, 1921. Claimant is seeking to recover \$9,417.89.

2. The circumstances giving rise to this claim are as follows: In the early part of April, 1918, the Bureau of Aircraft Production sent out circular letters seeking information relative to prospective sources of supply for castor beans. One of these letters came to the attention of Mr. Gilbert E. Fuller, of Boston, Mass. Mr. Fuller was in Washington in March, 1918, and called on Capt. Chas. Mayer, jr., chief of the Castor Bean Section. Mr. Fuller informed Capt. Mayer that he and two of his associates were lessees of about 3,000 acres of

land in the Bahama Islands, and that they were willing to plant a small acreage of this land to castor beans if an agreement with the Castor Bean Section could be reached. Capt. Mayer replied that he was not interested in a small acreage, but that if Mr. Fuller and his associates could plant from 5,000 to 10,000 acres in castor beans he would give them a contract. Mr. Fuller went back to Boston and reported to his associates. As a result of this conference they decided to send Mr. H. G. Highman to the Bahama Islands to investigate conditions and make necessary arrangements for the planting and growing of a large acreage of castor beans in the event Mr. Fuller and his associates received a contract for the same. Mr. Highman went down to the Bahamas in April and was there about two weeks. He made arrangements with the authorities to export castor beans from the island and also engaged some natives to gather wild castor beans for seed on one of the small islands. On his return he reported that about 20,000 acres of land suitable for growing castor beans could be secured. Mr. Fuller communicated this information to Capt. Mayer by letter and received a letter in reply to the effect that all contracts for growing castor beans had been suspended. In May, 1918, Mr. Fuller came to Washington and informed Capt. Mayer that he and his associates had been to considerable expense in sending Mr. Highman to the Bahamas in the expectation of getting a contract. Capt. Mayer replied that he could do nothing at that time, but that later in the year the Government might decide to make further contracts for the planting and growing of castor beans.

On July 9, 1918, Capt. Mayer wrote Mr. Fuller requesting him to come to Washington to discuss a contract for growing castor beans in the Bahama Islands. Mr. Fuller came to Washington the following week to interview Capt. Mayer, who stated that he was ready to enter into a contract with Mr. Fuller for the planting and growing of castor beans in the Bahamas, the contract to extend over a period of one year. Mr. Fuller was requested to ascertain the proper time for planting castor beans in the Bahamas and also to make any necessary arrangements with the British Government for planting and growing the beans and exporting the same. Mr. Fuller did not know the time of the planting season and did not know what arrangements it would be necessary to make with British Government, but communicated with F. C. Wells Durant, attorney general for the Bahamas. Mr. Durant replied that he would be in New York in August. Mr. Fuller interviewed Mr. Durant in New York in August and learned that it would be necessary to form a British corporation in the Bahama Islands in order to carry out the proposed contract. Mr. Durant was engaged to attend to the legal work incident to forming a corporation

which was to be known as the Bahama Agriculture & Trading Co. (Ltd.).

3. Mr. Fuller states that it was in July or August, 1918, that he was assured by Capt. Mayer that he and his associates would be given a contract for the planting and growing of castor beans in the Bahamas and that he was instructed by Capt. Mayer to proceed in the absence of a formal contract. Capt. Mayer states that, according to his best recollection, it was in September or October that definite assurances and instructions were given to Mr. Fuller.

On August 31, 1918, Mr. Fuller sent the following telegram to Mr. Highman:

"Confirming connection contract closed for growing castor beans in Bahamas for Aircraft Production Board Captain Mayer and Durant Attorney General of Bahamas believe your services essential While I know importance of present position believe it your patriotic duty to undertake this work Position will guarantee you thirty six hundred and offer possibility of earning ten thousand additional."

On September 15, 1918, Mr. Fuller and his associates engaged Mr. Highman as superintendent in charge of the planting and growing of castor beans in the Bahamas. Mr. Highman came to Washington and secured passports for himself and family on September 15 and also made arrangements for castor-bean seed with the Castor Bean Section and then proceeded to the Bahamas. The agreement with Mr. Highman was that he was to receive a salary of \$300 per month from September 15, 1918, to December 31, 1919, and also to receive a commission of 10 per cent on all profits realized out of the castor-bean contract and also expenses for himself and family to and from Nassau.

4. On October 20, 1918, Mr. Fuller was notified that the charter had been granted to the Bahama Agriculture & Trading Co. (Ltd.), and on October 30 he came to Washington for the purpose of closing the contract.

On November 7, 1918, Maj. Mayer telegraphed Mr. Fuller to incur no further expense in connection with the castor-bean contract until authorized to do so. Mr. Fuller was in Washington at this time for the purpose of signing the contract. He called on Maj. Mayer and was instructed by him not to recall Mr. Highman from the Bahamas until it was definitely decided that the contract would be cancelled.

On November 8, 1918, the Bureau of Aircraft Production issued Purchase Order No. 810067 to the Bahama Agriculture & Trading Co. (Ltd.). This order called for the planting and growing of castor beans on approximately 5,000 acres of land in the Bahamas, not to exceed a total yield of 100,000 bushels, at \$0.098 per pound ex-dock United States port, with the option on the part of the contractor to plant an additional 5,000 acres on the same terms.

On November 9, 1918, a formal contract, No. 5367, covering the above purchase order was entered into between the United States and the Bahama Agriculture & Trading Co. (Ltd.). This contract was executed on behalf of the United States by F. D. Schnacke, Captain, A. S. A. P., and on behalf of the contractor by Mr. Gilbert E. Fuller, vice president.

The testimony of Mr. Fuller and Maj. Mayer is to the effect that the formal contract was prepared and executed for the sole purpose of enabling the contractor to present a valid claim against the United States because of the suspension of the informal agreement which had previously been entered into between the parties.

5. On December 10, 1918, the contractor was given formal notice of the suspension of the contract entered into on November 9, 1918.

On December 18, 1918, Maj. Mayer telegraphed Mr. Fuller requesting him to come to Washington to negotiate a cancellation of the contract. Mr. Fuller came to Washington on December 20, 1918, and at that time discussed with Maj. Mayer the general terms of the cancellation, and came down again in January, 1919, and again discussed the terms of cancellation with Maj. Mayer and also with certain officers in the Finance Division. The finance officers appear to have expressed an opinion that certain items of expenditures made for which claimant was requesting reimbursement would be disallowed, while other items would be allowed. Mr. Fuller has insisted that a definite agreement was made that certain of the items which were later disallowed by the Air Service Section were agreed upon as properly allowable by the finance officers. However, we are unable to find that any definite promise was made by Maj. Mayer or by the finance officers that any specific items would be allowed. The most that can be said for claimant is that these officers expressed their opinion to the effect that certain items were proper charges and should be allowed.

6. The itemized statement of claim as finally presented to the Air Service Section and the award thereon by that Section is as follows:

	Claimed.	Approved.	Disap- proved.
"H. A. Highman.—Expenses.			
1. April 1918, expenses to Nassau to engage land and laborers in performance of contract.....	\$185. 45	.....	\$185. 45
2. Expense to Washington in connection with procuring seed in performance of contract (Sept. 1918).....	61. 12	\$61. 12	.....
3. Expense (Sept., Oct., 1918), Boston-Nassau in performance of contract.....	631. 52	} 513. 54	1, 097. 16
4. Oct. 1918—Expenses in Nassau in performance of contract.....	117. 25		
5. Nov. 1918—Expenses in Nassau in performance of contract.....	58. 31		
6. Dec. 1918—Expenses in Nassau in performance of contract.....	55. 25		
7. Expenses Nassau and return to Boston.....	748. 37	} 1, 260. 00	100. 00
8. Salary, April 1918—in performance of contract.....	100. 00		
9. Salary Sept. 1918 to Jan. 31, 1919.....	1, 350. 00	1, 260. 00	90. 00
10. Cost of moving furniture 2 ways.....	86. 00	.....	86. 00
11. Storage of furniture 4 mo. at \$9.....	36. 00	.....	36. 00

	Claimed.	Approved.	Disap- proved.
"G. E. Fuller.—Expenses.			
12. April, 1918—Trip to Washington in performance of contract.....	\$54. 73	.....	\$54. 73
13. July 1918—Trip to Washington in performance of contract.....	64. 77	.....	64. 77
14. August 1918—Two trips to N. Y. in performance of contract.....	116. 06	.....	116. 06
15. Nov. 1918—Two trips to Washington in performance of contract.	163. 84	\$155. 84	8. 00
16. Dec. 1918—Trip to Washington in performance of contract.	60. 03	.....	60. 03
"Miscellaneous Expenses.			
17. Cables in performance of contract.....	28. 95	.....	28 95
18. Telegrams in performance of contract.....	8. 67	.....	8. 67
19. Telephone in performance of contract.....	20. 95	.....	20. 95
20. Miscellaneous in performance of contract.....	7. 25	.....	7. 25
"F. C. Wells Durant.			
21. Legal expenses, £110 5s., at \$4.80 in connection with performance of contract, as per instructions from the department.....	529. 20	.....	529. 20
22. Amount agreed upon as partial reimbursement for loss on investment on Steamship Maysie.....	3, 000. 00	.....	3, 000. 00
23. Reimbursement for H. A. Highman for loss of salary 11 months at \$50. per mo. per agreement with Department.....	550. 00	.....	550. 00
24. (Sub-contract) Rose Island Trust.....	528. 00	.....	528. 00
25. 10% on above.....	8, 561. 72	1, 990. 50	6, 571. 22
	858. 17	199. 05	657. 12
	9, 417. 89	2, 189. 55	7, 228. 34"

7. On August 27, 1920, the standing committee of the War Department Claims Board passed a resolution to the effect that this claim should be settled on the basis of the formal contract of November 9, 1918, and not on the basis of the informal contract under the act of March 2, 1919. It was pursuant to this action of the standing committee that the Air Service Section made its award in this case. On March 11, 1921, the standing committee of the War Department Claims Board adopted a resolution rescinding its action of August 27, 1920, and ordered the entire record in this case forwarded to the Appeal Section for appropriate action de novo.

DECISION.

1. The evidence conclusively establishes the fact that an informal agreement was entered into between Capt. Charles Mayer, jr., Chief of the Castor Bean Section, Bureau of Aircraft Production, on behalf of the United States, and Mr. G. E. Fuller, on behalf of himself and his associates, by the terms of which Mr. Fuller and his associates obligated themselves to plant and cultivate castor beans on approximately 5,000 acres of land in the Bahama Islands and deliver to the United States the beans grown thereon, at \$3 per bushel at Bahamas, or \$4.50 at port in the United States. This agreement was entered into about September 1, 1918, and Mr. Fuller was instructed to proceed to carry out the terms of the agreement in the absence of a formally executed contract which would be executed when the corporation had been organized in the Bahama Islands.

claimant saw fit to reimburse Mr. Highman this expense, that is no reason why claimant should now be reimbursed for same by the United States. These two items are disallowed.

G. E. FULLER, EXPENSES.

Item 12.—April, 1918, trip to Washington----- \$54. 73

This item was disallowed by the Air Service Section as a preliminary expense incurred in an effort to negotiate a contract. Disallowance of this item is approved.

Item 13.—July, 1918, trip to Washington----- \$64. 77

This item was disallowed by the Air Service Section for the reason stated above. It would seem that Mr. Fuller made this trip to Washington at the request of Capt. Mayer, but for the purpose of discussing the contract. Clearly there was no promise, express or implied, that Mr. Fuller would be reimbursed the expenses of this trip. It was clearly a preliminary expense incurred in an effort to negotiate a contract and can not be said to have been incurred upon the faith of the agreement subsequently entered into. This item is disallowed.

Item 14.—August, 1918, two trips to New York----- \$116. 06

This item represents expenses incurred by Mr. Fuller in making two trips to New York in August to consult with Mr. Durant, attorney general of the Bahamas, and was for the purpose of obtaining from Mr. Durant information relative to the growing of castor beans in the Bahamas. Clearly the Government should not be charged for expenses incurred by the prospective contractor in his efforts to obtain information which it was necessary for him to have before he could enter into a contract with the Government. The action of the Air Service Section in disallowing this item is approved.

Item 15.—November, 1918, two trips to Washington----- \$163. 84

The Air Service Section deducted \$8 from this item as expense which it did not consider properly chargeable to the contract and allowed the balance, viz, \$155.84.

Item 16.—December, 1918, trip to Washington----- \$60. 03

The Air Service Section disallowed this item. We are unable to see why claimant should be allowed expenses of two trips to Washington in November, 1918, and disallowed expenses of one trip to Washington in December, 1918. On principle a contractor is not entitled to be reimbursed expenses incurred in his efforts to negotiate a contract with the United States, nor is he entitled to be reimbursed for expenses incurred in prosecuting a claim against the United States. For these reasons both of the above items are disallowed.

MISCELLANEOUS ITEMS.

<i>Item 17.</i> —Cables in performance of contract.....	\$28.95
<i>Item 18.</i> —Telegrams in performance of contract.....	8.67
<i>Item 19.</i> —Telephone in performance of contract.....	20.95
<i>Item 20.</i> —Miscellaneous in performance of contract.....	7.25
Total.....	65.82

These items were disallowed by the Air Service Section because of lack of proof. Mr. Fuller made affidavit to the correctness of these items. In our opinion they are reasonable in amounts, and the affidavit by Mr. Fuller is sufficient evidence that they were incurred. The above items in the sum of \$65.82 are therefore allowed.

EXPENSES OF F. C. WELLS DURANT.

<i>Item 21.</i> —Legal expenses, £110 5s., at \$4.80.....	\$529.20
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This item represents the amount paid by claimant to Mr. Durant for legal services in obtaining a charter for the Bahama Agriculture & Trading Co. (Ltd.) and for his "influence" in procuring a proclamation to be issued by the Governor of the Bahamas permitting the corporation to export castor beans. This item was disallowed by the Air Service Section on the theory that it was preliminary expense incurred by Mr. Fuller and his associates in order to make it possible for them to enter into a contract with the United States. The organization of the corporation under the laws of Great Britain was necessary before the contract could be performed. A part of the agreement with Capt. Mayer was that the corporation would be formed. The entire fee paid the attorney for obtaining the charter and the Governor's proclamation permitting the export of beans was a necessary expenditure in preparing to perform the agreement. This item is therefore allowed.

<i>Item 22.</i> —Loss on investment in Steamship "Maysie".....	\$3,000.00
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This item represents an expenditure of \$3,000 for 615 shares of stock in the steamship *Maysie*. The cost of this ship was about \$10,000. The balance of the stock was subscribed by other parties, and the boat was to be used for general freighting purposes between the Bahamas and the Florida coast. Claimant acquired an interest in the boat primarily for the purpose of transporting castor beans from the Bahama Islands to Miami, Fla. The purchase of this stock by claimant was made on October 22, 1918. The boat did not do enough business to justify its operation and creditors finally took possession of it, and claimant realized nothing on its investment. Mr. Fuller alleges that Maj. Mayer and the officers of the Finance Department with whom he discussed the terms of cancellation of the castor-bean contract agreed that the United States should reimburse claimant one-half of the amount invested in this boat, to wit, the sum of

\$1,500. The claim was originally filed for \$1,500, but was subsequently amended so as to include the full amount of the loss, \$3,000. The evidence does not support Mr. Fuller's contention that Maj. Mayer and the officers of the Finance Department agreed that claimant should be reimbursed \$1,500 on this item. They may have expressed their opinion to the effect that the item was properly allowable. However this may be, the above-mentioned officers were without authority to obligate the United States to any such agreement, and if such an agreement were entered into it would not be binding upon the United States. There was no authority to adjust informal contracts until the act of March 2, 1919, was passed.

The purchase of \$3,000 in stock of the steamship *Maysie* was an independent transaction and can not be considered as an expenditure made upon the faith of the agreement entered into between claimant and the United States for the growing of castor beans. It may, at that time, have appeared to claimant to be a good business venture, although there could be no castor beans for the boat to carry until the following year. Certainly there was no necessity for the investment to have been made at the time it was made, even if claimant considered the acquisition of the stock necessary in order to enable it to transport the castor beans. The testimony is not convincing that other means of transportation of castor beans would not have been available when the time came to transport them. This item was disallowed by the Air Service Section. The Appeal Section approves of this action, and the item is accordingly disallowed.

Item 23.—Reimbursement to H. A. Highman for loss of salary of 11 months. at \$50.00 per month----- \$550.00

Mr. Highman was employed by Mr. Fuller and his associates at \$300 per month, beginning September 15, 1918, and ending December 31, 1919. He gave up a position in Boston to accept the position with claimant. He remained with claimant until January 31, 1919, and then went with the United States Shipping Board at \$250 per month. Claimant has paid Mr. Highman the amount of the above item, which represents the difference in salary between what he would have earned had he remained with the claimant and what he did earn with the Shipping Board during the remaining 11 months he was to have been in claimant's employ. This item was disallowed by the Air Service Section on the theory that as the agreement between claimant and Mr. Highman was for a period of more than 12 months and was not in writing, said agreement was, under the laws of Massachusetts, within the Statute of Frauds and therefore not binding upon claimant. Claimant contends that the telegram of August 31, 1918, from Mr. Fuller to Mr. Highman, above quoted, takes the agreement out of the Statute of Frauds. The telegram was merely an offer. It did not state the time Mr. Highman was to be employed and did not state

the terms of the agreement subsequently entered into between the parties. The agreement finally entered into was for a period of more than a year, and was therefore clearly within the Statute of Frauds. Claimant did not ask to avoid payment of this item to Mr. Highman, although it could successfully have done so by pleading the Statute of Frauds. The Act of March 2, 1919, authorizes reasonable reimbursement to a contractor for expenditures necessarily incurred in performing or in preparing to perform an informal agreement. In view of the good defense to this claim under the Statute of Frauds, it can not be said that the payment to Mr. Highman of the amount represented by this item was a necessary expenditure. The item is therefore disallowed.

Item 24.—Rose Island Trust Co. (subcontract) ----- \$528. 00

This item represents payments made by claimant to the Rose Island Trust Co. for clearing and preparing 10 acres of land in the Bahama Islands for the planting of castor beans. It appears that Mr. Fuller and one of his associates, Mr. J. Colby Bassett, in March or April, 1918, instructed the Rose Island Trust Co., a Bahama corporation, to clear and prepare 100 acres of land in the Bahama Islands for the planting of castor beans. Only 10 acres of ground were prepared, the cost of which it is alleged amounted to \$480, to which claimant has added 10 per cent, making the total amount of this item \$528. Claimant is seeking to have this claim allowed on the ground that the Rose Island Trust Co. was a subcontractor. We are unable to agree with claimant's contention with reference to this item. This agreement with the Rose Island Trust Co. was entered into long before claimant reached any agreement with Capt. Mayer with reference to the castor-bean crop. This item, therefore, can not be considered as an expenditure incurred in performing or preparing to perform the agreement which was finally entered into between the claimant and the United States. This item is therefore disallowed.

SUMMARY.

The following items and amounts are hereby awarded claimant:

1. <i>Item 2.</i> —Expenses of Mr. Highman to Washington in connection with procurement of seed (September, 1918) -----	\$61. 12
2. $\frac{1}{2}$ of Items 3, 4, 5, 6, and 7, totaling \$1,610.70, less \$70.08, covering two fares to Ann Arbor, Mich.-----	513. 54
3. <i>Item 9.</i> —Salary of Mr. Highman from Sept. 15, 1918, to Jan. 31, 1919-----	1, 350. 00
4. <i>Items 17, 18, 19, and 20, total</i> -----	65. 82
5. <i>Item 21.</i> —Legal expenses of F. C. Wells Durant-----	529. 20
	<hr/>
	2, 519. 68
6. Ten per cent on the above-----	251. 97
	<hr/>
	2, 771. 65

DISPOSITION.

The Appeal Section will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate Form "C" to the Air Service Section, War Department Claims Board, together with a copy of this decision for appropriate action in accordance with the terms thereof.

Lieut. Col. McKeeby and Capt. Woodfin concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

APRIL 27, 1921.

Case No. 3061.

In re CLAIM OF REO MOTOR CAR CO.

1. **CONTRACT, FORMAL, CONSTRUCTION.**—Where a formal cost-plus-fixed-profit contract provides that the contractor shall supply “at the most reasonable prices obtainable * * * such plant, machinery, tools, and other facilities * * * and the like, as may be necessary to enable * * * all the requirements of this contract * * * to be complied with in manner satisfactory to the contracting officer,” and the contractor purchases additional machine tools for the performance of said contract upon the urgent insistence of officers of the Government, the contractor is entitled to proper reimbursement for the cost of said machine tools under the contract.
2. **COSTS, ADDITIONAL, ALLOWANCE BY CONTRACTING OFFICER.**—Where a cost-plus-fixed-profit contract, after designating certain specific items of cost, in each instance exhausting the class, provides in a blanket clause that “further allowances of cost from time to time may be made by the contracting officer,” the “items of cost” contemplated in that clause are not limited to items analogous to those set forth therefore, but include any cost necessary to the performance of the contract. In this case this Board finds that the attitude and acts of Government officers constitute an allowance so far as the purchase of additional machine tools is concerned.
3. **CONTRACT, FORMAL, CONSTRUCTION.**—A formal contract must be construed in accordance with the clear meaning of the written instrument. Therefore, where the said contract makes no provisions for payment by the Government of the cost of plant rearrangement, either before or after the performance of the contract, the contractor is not entitled to recover from the Government any portion of these costs.
4. **INTEREST ON CLAIM AGAINST THE UNITED STATES.**—In the absence of statutory provisions or the terms of a specific contract no interest accrues on claims against the Government. Therefore, where the contractor has made disbursements for machine tools under the circumstances outlined in paragraph 1, and reimbursement has been refused under a misconstruction of the contract, no interest can be allowed on the sum of money in controversy.
5. **INTEREST ON BORROWED MONEY, REIMBURSEMENT FOR.**—Where a contractor with the Government seeks reimbursement for interest on money borrowed during a Government contract, it is essential to claimant's right of recovery that it be conclusively shown that the money was actually borrowed during said contract and applied to the specific purpose covered by its provisions. Claimant's inability to establish this fact is fatal to recovery.

6. DELAYS, COST OF, RESPONSIBILITY OF GOVERNMENT.—The Government under the provisions of a formal contract undertook to furnish complete drawings by December 31, 1917. The said drawings were not supplied to the contractor until several months thereafter, thereby causing the contractor additional expense under the contract. The Government is responsible for and the contractor is entitled to reimbursement of the actual cost and expense to which he has been subjected.

7. CLAIM AND DECISION.—Appeal by the Reo Motor Car Co. from an award by the Ordnance Section, War Department Claims Board, on a claim for \$792,105.26 under a suspended cost-plus-fixed-profit contract for 3,000 artillery tractors and spare parts. Held, claimant entitled to relief in part.

Capt. Woodfin writing the opinion of the Board.

This claim arises under a formal cost-plus-fixed-profit contract, and comes before the Appeal Section, War Department Claims Board, on appeal from an award of the Ordnance Section. Counsel for claimant stated that no further hearing was sought, but it was desired that this Section review the action of the Ordnance Section upon the record.

FINDINGS OF FACT.

1. On December 11, 1917, the Reo Motor Car Co. entered into a contract, Ordnance Contract CME 469, with Lieut. Col. J. H. Rice, contracting officer for the Ordnance Department. The contract provided that the Reo Motor Car Co. should manufacture 3,000 5-ton artillery tractors, Model 1917, at cost plus a fixed profit of \$250 per tractor, and sets of spares, consisting of individual parts, assemblies, and complete tractors, as specified by the contracting officer, approximating in value 30 per cent of the cost of the said 3,000 tractors, at cost plus a fixed profit of \$75 per set of spares. Two supplements to this contract, one formal and one informal, are not involved in the present case.

2. The following provisions of the contract are pertinent in the consideration of the claim:

“ARTICLE II. Time being of the essence, the Contractor agrees to provide, with the utmost dispatch, at the best prices obtainable, (1) such administrative, purchasing, manufacturing, and accounting organization, (2) such plant, machinery, tools, and other facilities, and (3) such labor, material, supplies, and the like as may be necessary to enable the articles to be made and all the requirements of this contract, including the requirements in respect of the storage and delivery of the articles contemplated herein, to be complied with in manner satisfactory to the Contracting Officer. * * * All property paid for by the United States shall upon such payment become the property of the United States, shall be kept so far as practicable separate and apart from property belonging to the Contractor and other property in his possession, and shall be marked as the Contracting Officer may direct. In operating, caring for, and storing prop-

erty of the United States, the Contractor shall use his best efforts adequately to protect the same but shall not be liable for any loss or damage thereto except such as may be caused by the willful default or negligence of the Contractor."

"ARTICLE III. * * * Deliveries of the articles, suitably packed, boxed, and marked as directed by the Contracting Officer, shall be made to the Contracting Officer f. o. b. cars at the plant of the Contractor at Lansing, Michigan, but the contractor, at the cost and risk of the United States, shall store the articles in such manner and for so long a period, not exceeding one year after acceptance by the Contracting Officer (which acceptance in such case shall constitute a delivery for the purpose of payments hereunder), as the Contracting Officer shall request, providing such space and buildings as may be desirable for adequate and safe storage, and in determining such cost, the rental for the use of land and buildings of the Contractor shall be determined as hereinafter in Article X hereof provided: * * *

SCHEDULE OF DELIVERIES.

"To begin by May 1, 1918, and entire order to be completed by November 30, 1918; delivery after June 1 being at the rate of not less than 450 per month. These dates are fixed on the assumption that approved drawings are supplied by December 31, 1917, and if not supplied by that date, delivery date will be adjusted to take into account the delay in supplying drawings."

"ARTICLE V. The allowance of the cost to the Contractor of the articles, for which the United States shall pay, and the elements included in the term 'costs' as used in this contract are as follows:

(1) *The cost of all direct labor* paid for by the Contractor and used in the production of the articles contracted for herein.

(2) *The cost of all direct materials* contained in or forming part of the articles contracted for herein.

(3) *Pro rata share of factory overhead expenses* applicable and necessary in connection with the manufacture of the articles contracted for herein.

(4) *Pro rata share of administrative and general expenses* applicable to and necessary in connection with the manufacture of the articles contracted for herein.

(5) If the United States Government desires to establish a cost system, in order to obtain a more detailed cost of the tractors or parts, than can be obtained from the records of the Reo Motor Car Company, such part of the additional cost as may fairly be charged to this order, will be borne by the United States.

(6) The cost of all patterns, dies, tools, jigs, fixtures, etc., used in connection with the manufacture of the articles ordered herein, are to be included in the cost and the articles involved remain the property of the United States.

The foregoing paragraphs Nos. 1, 2, 3, and 4 are subject to further amplification as contained in the 'Definition of cost pertaining to contracts' to be supplied by the Finance Division (Accounting Section) of the Ordnance Department, to which reference is hereby made for the guidance of the Contracting Officer and the Contractor as to the specific items of cost which will be allowed under the foregoing four

general definitions. As conditions arise necessitating changes or modifications in the definitions referred to the Contracting Officer will furnish the Contractor with information in regard thereto.

In addition thereto further allowances of cost from time to time may be made by the Contracting Officer, and the United States shall pay any direct tax that may be levied against the articles by the United States.

The United States shall not be obligated to reimburse the Contractor for any expenditures relating to the performance of this contract unless the approval of the Contracting Officer shall have been obtained.

* * * * *

The decision of the Contracting Officer on all questions of the allowance and determination of cost and the payment thereof shall be final, except that either upon the completion of the contract by the Contractor, or its termination by the United States, or whenever claims of cost amounting in the aggregate to \$10,000, shall have been disallowed or determined adversely to the Contractor by the Contracting Officer, the Contractor may appeal to the Chief of Ordnance by filing one statement of claim which shall embrace all claims of cost previously disallowed or adversely determined, provided that all such claims shall be certified by an accountant designated by the Contracting Officer as being in their entirety the subject of expenditure of, or cost to, the Contractor."

"ARTICLE IX. In the event that in the opinion of the Chief of Ordnance the public interests so require, this contract may be terminated by notice in writing to the Contractor, without prejudice to any claim the United States may have against the contractor.

In the event of the termination of this contract as aforesaid, the United States shall pay the Contractor all costs and obligations of the Contractor theretofore incurred and not previously paid, which may be allowed pursuant to Article V hereof, together with the fixed profit herein provided upon all articles previously delivered and accepted.

* * * * *

In the event that the Contractor shall not be in default under this contract at the date of such termination, the Contractor shall be paid a sum which together with all fixed profit theretofore paid shall be equivalent to ten (10%) per cent of all cost which the United States shall have previously paid, and shall then be obligated to pay, except the cost of raw material, supplies, and the like, which shall have been purchased by the Contractor for use in the performance of this contract but shall not have been used in making the articles delivered and accepted.

* * * * *

In the event of the termination of this contract as aforesaid any and all obligation of the United States to make any payments to the Contractor hereunder, other than those specified in this Article IX shall at once cease and determine."

"ARTICLE X. Upon the completion of this contract, whether by the Contractor or by the United States, or the termination of the contract without further performance thereof in accordance with Article IX hereof, or from time to time during the performance of

this contract, the Contractor agrees to make such disposition, at the expense and for the account of the United States, of unused material, supplies, and the like, scrap, waste, or defective material, rejected articles, and generally all property which shall have been paid for by the United States, as the Contracting Officer shall in writing direct; such direction to be given during the performance of this contract or within 60 days after its completion. If permitted by law, any of the foregoing property may be sold to the Contractor by the Contracting Officer upon terms mutually agreeable. If the Contractor is thereby required to store such property, the cost of storage and all cost incident thereto shall be from time to time paid to the Contractor by the United States. If land and buildings of the Contractor are used for storage, the United States shall pay to the Contractor a reasonable rental therefor, as may be mutually agreed upon, or if agreement is impossible, as may be fixed by the Chief of Ordnance, but in no event to exceed ten per centum per annum of the cost of such land and buildings to the Contractor, or a proportion of such cost according to the proportion of land and buildings used. It is agreed that the foregoing provisions as to rental shall apply to any storage of the articles in accordance with Article III hereof.

"ARTICLE XXII. Except as this contract shall otherwise provide, any doubts or disputes which may arise as to the meaning of anything in this contract shall be referred to the Chief of Ordnance for determination. If, however, the contractor shall feel aggrieved at any decision of the Chief of Ordnance upon such reference, he shall have the right to submit the same to the Secretary of War, whose decision shall be final."

"ARTICLE XXIV. * * * Wherever the term 'Contracting Officer' is used in this contract the same shall be construed to mean the Contracting Officer executing this agreement, his successor or successors, his duly authorized agent or agents, or anyone designated by the Chief of Ordnance, from time to time, to act as Contracting Officer hereunder."

3. There was a material delay in delivery of the drawings to the contractor and an extension of time was granted by the contracting officer amounting to four months. Work under the contract was suspended January 17, 1919, at the request of the United States. At that time, 2,000 of the 3,000 tractors and 331.54175 sets of spare parts had been completed; on which the claimant has been paid a fixed profit provided by the contract in the sum of \$524,865.64.

4. The contractor filed claim before the Detroit District Ordnance Claims Board which was eventually forwarded to the Ordnance Claims Board in Washington with the recommendations of the District Board.

5. A hearing was held before the Ordnance Claims Board on June 9, 1920, at which time the contractor filed an amended claim set forth as follows:

(a) Accelerated depreciation on Reo machinery-----	\$56,477.89
(b) Coal on hand for contract use-----	14,056.17
(c) Interest on money borrowed for contract-----	38,629.52

general definitions. As conditions arise necessitating changes or modifications in the definitions referred to the Contracting Officer will furnish the Contractor with information in regard thereto.

In addition thereto further allowances of cost from time to time may be made by the Contracting Officer, and the United States shall pay any direct tax that may be levied against the articles by the United States.

The United States shall not be obligated to reimburse the Contractor for any expenditures relating to the performance of this contract unless the approval of the Contracting Officer shall have been obtained.

* * * * *

The decision of the Contracting Officer on all questions of the allowance and determination of cost and the payment thereof shall be final, except that either upon the completion of the contract by the Contractor, or its termination by the United States, or whenever claims of cost amounting in the aggregate to \$10,000, shall have been disallowed or determined adversely to the Contractor by the Contracting Officer, the Contractor may appeal to the Chief of Ordnance by filing one statement of claim which shall embrace all claims of cost previously disallowed or adversely determined, provided that all such claims shall be certified by an accountant designated by the Contracting Officer as being in their entirety the subject of expenditure of, or cost to, the Contractor."

"ARTICLE IX. In the event that in the opinion of the Chief of Ordnance the public interests so require, this contract may be terminated by notice in writing to the Contractor, without prejudice to any claim the United States may have against the contractor.

In the event of the termination of this contract as aforesaid, the United States shall pay the Contractor all costs and obligations of the Contractor theretofore incurred and not previously paid, which may be allowed pursuant to Article V hereof, together with the fixed profit herein provided upon all articles previously delivered and accepted.

* * * * *

In the event that the Contractor shall not be in default under this contract at the date of such termination, the Contractor shall be paid a sum which together with all fixed profit theretofore paid shall be equivalent to ten (10%) per cent of all cost which the United States shall have previously paid, and shall then be obligated to pay, except the cost of raw material, supplies, and the like, which shall have been purchased by the Contractor for use in the performance of this contract but shall not have been used in making the articles delivered and accepted.

* * * * *

In the event of the termination of this contract as aforesaid any and all obligation of the United States to make any payments to the Contractor hereunder, other than those specified in this Article IX shall at once cease and determine."

"ARTICLE X. Upon the completion of this contract, whether by the Contractor or by the United States, or the termination of the contract without further performance thereof in accordance with Article IX hereof, or from time to time during the performance of

this contract, the Contractor agrees to make such disposition, at the expense and for the account of the United States, of unused material, supplies, and the like, scrap, waste, or defective material, rejected articles, and generally all property which shall have been paid for by the United States, as the Contracting Officer shall in writing direct; such direction to be given during the performance of this contract or within 60 days after its completion. If permitted by law, any of the foregoing property may be sold to the Contractor by the Contracting Officer upon terms mutually agreeable. If the Contractor is thereby required to store such property, the cost of storage and all cost incident thereto shall be from time to time paid to the Contractor by the United States. If land and buildings of the Contractor are used for storage, the United States shall pay to the Contractor a reasonable rental therefor, as may be mutually agreed upon, or if agreement is impossible, as may be fixed by the Chief of Ordnance, but in no event to exceed ten per centum per annum of the cost of such land and buildings to the Contractor, or a proportion of such cost according to the proportion of land and buildings used. It is agreed that the foregoing provisions as to rental shall apply to any storage of the articles in accordance with Article III hereof.

"ARTICLE XXII. Except as this contract shall otherwise provide, any doubts or disputes which may arise as to the meaning of anything in this contract shall be referred to the Chief of Ordnance for determination. If, however, the contractor shall feel aggrieved at any decision of the Chief of Ordnance upon such reference, he shall have the right to submit the same to the Secretary of War, whose decision shall be final."

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4. The contractor filed claim before the Detroit District Ordnance Claims Board which was eventually forwarded to the Ordnance Claims Board in Washington with the recommendations of the District Board.

5. A hearing was held before the Ordnance Claims Board on June 9, 1920, at which time the contractor filed an amended claim set forth as follows:

(a) Accelerated depreciation on Reo machinery-----	\$56,477.89
(b) Coal on hand for contract use-----	14,058.17
(c) Interest on money borrowed for contract-----	36,629.47

on the machinery; that by reason of those facts the machinery was subject to accelerated depreciation amounting to a 50 per cent increase of the normal. The percentage of increase is an arbitrary figure selected by the company.

The claimant fixed the proportion of depreciation chargeable to the contract by taking the percentage representing the relation of productive labor employed on Government work to the total productive labor in the plant, which shows the average for the period covered of 45.47 per cent.

The company wrote off a depreciation of $7\frac{1}{2}$ per cent on factory equipment and 10 per cent on machinery and charged 45.47 per cent of the amount to the Government. This amounted to \$81,502.01, which has been paid. The claimant's present contention is that owing to conditions outlined above the percentage written off for depreciation was too low and the amount paid by the Government should be increased 50 per cent. The correctness of this contention we can not concede. It is clear that all overtime is reflected in the figures paid by the Government for productive labor, and therefore any accelerated depreciation chargeable to overtime on Government work is covered by payment already made for depreciation. In addition to this the company was allowed time and a half for all overtime. This would also increase the amount paid by the Government for productive labor, though no corresponding depreciation would accrue.

It is also worthy of comment that in fixing the overtime estimate of 44.09 per cent claimant has selected the two weeks' period ending September 18, 1918. Five hundred tractors were delivered during the month of October, which was the largest delivery during the performance of the contract. It is safe to assume that a great deal of the overtime work necessary to accomplish the peak of production took place in September. The single two weeks' period chosen by claimant, therefore, does not disclose the real percentage of overtime chargeable to the contract and would afford no satisfactory basis for a proper estimate of any conceivable charge to the Government. We are of the opinion that claimant is not entitled to any allowance for depreciation other than that which they have already received. The decision of the Ordnance Section as to this item is affirmed.

2. (b) *Claim for reimbursement for 2,632.85 tons of coal at \$4.84 per ton plus a handling charge of 50 cents per ton, aggregating \$14,056.17.*—The Reo Co. had its own source of supply for coal suitable for use in its plant and believed that it had a sufficient reserve to meet its needs. However, the officers of the Government feared that a shortage of coal might be experienced, and at their earnest solicitation and direction the claimant undertook to increase its reserve supply. At that time the Fuel Administration had restricted the

the contractor is willing to concede that the action of the Board with respect to some of the items was justified by the facts before it, i. e., the claimant has been unable with respect to such items to present satisfactory evidence as to the amount due it on such account. For this reason, and to facilitate an early adjustment of all outstanding differences, it urges no present claim with respect to the following items:

- (d) Losses incurred during delay (claimed under item (o)).
- (j) Excess demurrage on Reo materials.
- (m) Loss of profits.
- (p) Losses on plant occupied January to May, 1918 (claimed under item (o))."

No further consideration will be given these items.

9. The claim as before this Section for consideration, therefore, is as follows:

(a) Accelerated depreciation-----	\$40,751.00
(b) Coal-----	13,880.44
(c) Interest on borrowed money-----	36,629.47
(e) Tools unaccounted for-----	17,574.77
(f) Equipment for washing tractors-----	577.54
(g) Office and factory equipment-----	655.44
(h) Fencing-----	1,275.52
(i) Storage on Government material-----	39,297.45
(k) Interest on cost of special facilities-----	23,072.98
(l) Accounting services-----	22,888.74
(n) Profit or compensation (amount not determined)-----	-----
(o) Excess overhead during delay (Board's allowance on this item is considered wholly inadequate)-----	65,230.25
(q) Unabsorbed overhead following termination-----	320,212.78
(s) Cost of machine tools (about) (Ordnance Section allowed depreciation on this item of \$20,949.84)-----	255,000.00
(t) Plant rehabilitation-----	-----

With respect to some of the above the Reo Co. has manifested a readiness to accept the award of the Bureau Board, but, in order to fully determine the rights of the parties, this Section deems it necessary to review the findings and award of that Board in their entirety with reference to the items now presented. Further facts are set forth in the decision.

DECISION.

1. (a) *Accelerated depreciation*—\$40,751.—This item was originally presented in the sum of \$56,477.89. This was reduced in presentation to the Ordnance Section to \$40,751, covering the period from May 1, 1918, to February 28, 1919. This claim is advanced on the theory that owing to the emergency character of the work on this contract the plant and machinery of the contractor was subjected to more strenuous use than under normal working conditions; that the articles being manufactured for the Government were of heavier type than those usually machined by the company, and therefore harder

on the machinery; that by reason of those facts the machinery was subject to accelerated depreciation amounting to a 50 per cent increase of the normal. The percentage of increase is an arbitrary figure selected by the company.

The claimant fixed the proportion of depreciation chargeable to the contract by taking the percentage representing the relation of productive labor employed on Government work to the total productive labor in the plant, which shows the average for the period covered of 45.47 per cent.

The company wrote off a depreciation of $7\frac{1}{2}$ per cent on factory equipment and 10 per cent on machinery and charged 45.47 per cent of the amount to the Government. This amounted to \$81,502.01, which has been paid. The claimant's present contention is that owing to conditions outlined above the percentage written off for depreciation was too low and the amount paid by the Government should be increased 50 per cent. The correctness of this contention we can not concede. It is clear that all overtime is reflected in the figures paid by the Government for productive labor, and therefore any accelerated depreciation chargeable to overtime on Government work is covered by payment already made for depreciation. In addition to this the company was allowed time and a half for all overtime. This would also increase the amount paid by the Government for productive labor, though no corresponding depreciation would accrue.

It is also worthy of comment that in fixing the overtime estimate of 44.09 per cent claimant has selected the two weeks' period ending September 18, 1918. Five hundred tractors were delivered during the month of October, which was the largest delivery during the performance of the contract. It is safe to assume that a great deal of the overtime work necessary to accomplish the peak of production took place in September. The single two weeks' period chosen by claimant, therefore, does not disclose the real percentage of overtime chargeable to the contract and would afford no satisfactory basis for a proper estimate of any conceivable charge to the Government. We are of the opinion that claimant is not entitled to any allowance for depreciation other than that which they have already received. The decision of the Ordnance Section as to this item is affirmed.

2. (b) *Claim for reimbursement for 2,632.85 tons of coal at \$4.84 per ton plus a handling charge of 50 cents per ton, aggregating \$14,056.17.*—The Reo Co. had its own source of supply for coal suitable for use in its plant and believed that it had a sufficient reserve to meet its needs. However, the officers of the Government feared that a shortage of coal might be experienced, and at their earnest solicitation and direction the claimant undertook to increase its reserve supply. At that time the Fuel Administration had restricted the

field of supply accessible to the Reo Co. and the coal under discussion was purchased in that territory designated by the Fuel Administration. The evidence is to the effect that upon receipt the coal was found entirely unsatisfactory for use in the plant of claimant company; that no shortage was in fact suffered, and that the coal has not been, or will be, used by claimant. It is apparent that in view of the circumstances reimbursement for the cost thereof is a proper charge against the Government. The Ordnance Section did not feel that the charge of 50 cents per ton for handling was sufficiently supported, but found as a fact that the coal had been necessarily handled and allowed a handling charge of 5 per cent on the cost of the coal, making the whole item aggregate \$13,380.14. From this award the claimant has not appealed. The amount allowed by the Ordnance Section is proper and the action of said Section with respect to this item is approved.

3. (c) *Interest on money borrowed for contract, \$36,629.47.*—This item was allowed in full by the Ordnance Claims Board. Pamphlet of the Ordnance Department, known as "Definition of cost pertaining to contracts," specifically referred to in Article V of the contract "for the guidance of the contracting officer and the contractor as to the specific items of cost which will be allowed * * *" provides as follows:

"47. The interest on investment or on bonded debt shall not be considered as an expense entering into the cost of contracts for the United States, but the Contracting Officer will reimburse the Contractor for interest paid by it on money borrowed to finance the purchase of materials necessary to complete contracts for the United States. * * *"

Under that provision it is requisite to a contractor's right to reimbursement that it shall be conclusively shown that the interest for which reimbursement is sought was paid on money actually borrowed for the specific purpose of purchasing materials necessary to complete contracts for the United States. The evidence in the present instance is to the effect that the interest paid by claimant company was largely on notes made previous to undertaking this contract, which were renewed throughout the time of its performance; that the money which might otherwise have been used for the payment of said notes was used to defray the expense of claimant's commercial business and such other items with regard to the Government contracts as claimant considered desirable; that no effort was made by the company to separate in any way the amounts, if any, which were spent for Government work from those used in its commercial business. In fact, the evidence of claimant's witnesses is to the effect that the money was not actually borrowed for this contract and that no separation of any proportion applicable to said contract

could be made. The provision of the circular quoted above is clear and unmistakable in its terms. Therefore the inability of claimant to comply with said terms is fatal to the right of recovery. With regard to said item, the action of the Ordnance Section is reversed and the item disallowed.

4. Item (*d*) was withdrawn by the claimant.

5. (*e*) *Cost of tools not accounted for, \$17,574.77.*—It appears that throughout the life of this contract the claimant expended approximately \$155,000 for tools, which amount was paid by the Government. Upon taking an inventory at the close of the contract, it was found that a quantity of tools to the value of \$19,009.82 could not be accounted for. The item set forth in the claim of \$17,574.77 represents the cost of said tools, less their estimated scrap value. This amount was allowed by the Ordnance Claims Board in full. Article II of the contract quoted above provides as follows:

“All property paid for by the United States shall, upon such payment, become the property of the United States, shall be kept so far as practicable separate and apart from property belonging to the contractor and other property in his possession, and shall be marked as the Contracting Officer may direct. In operating, caring for, and storing property of the United States, the contractor shall use his best efforts adequately to protect the same and shall not be liable for any loss or damage thereto except such as may be caused by the willful default or negligence of the contractor.”

No question arises as to the “willful default” of the contractor in the present case. However, it is true that the contractor was fully cognizant of the fact that these tools were the property of the United States and that it was the contractor’s obligation to use its best efforts in caring for the same, and that it was to account for all tools, materials, and supplies at the close of the contract. The evidence is undisputed that the tools covered by this item were wholly unaccounted for, that they were never presented to any officer of the Government for disposition. These facts, in the opinion of the Board, bespeak such negligence on the part of the contractor as is contemplated under the provisions of the contract and as is sufficient to defeat any right to an allowance for these tools. The action of the Ordnance Section in allowing this item is hereby reversed and the amount disallowed.

6. (*f*) *Expenditures for arranging testing field, \$577.54.*—This item covers the cost of a small sprinkler tank, lumber, and the cost of water connection on the field used in testing tractors, amounting to \$1,018.39, less a salvage offer of \$440.85. It was necessary that the tractors manufactured under this contract should be subjected to tests in various conditions involving their use in heavy sand and deep mud. The testing ground used for this purpose was adjacent

to the plant of the contractor. The tractors were put through the sand test, and it was frequently necessary to drench certain portions of the testing ground very thoroughly with water in order to produce the mud conditions. After the tractors were tested they were thoroughly washed under a shed provided by the contractor at the instruction and direction of the Army officers in charge of the work. This item covers the necessary cost of the facilities used in that work. It is clearly a proper charge under the contract, and the amount as found by the Ordnance Section has been audited and found correct. The allowance by the Ordnance Section is approved.

7. (g) *Office and factory equipment, \$655.44.*—This covers the cost of cabinets, chairs, desks, typewriters, etc., amounting to \$2,715.82, less salvage value offered by claimant of \$2,060.38, leaving a balance of \$655.44. The office equipment furnished was for use in connection with this contract. The item was audited, allowed, and approved by the District Ordnance Claims Board, whose action was approved by the Ordnance Section, and is allowable under the contract. The amount is considered proper, and the action of the Ordnance Section with regard to this item is therefore confirmed.

8. (h) *Fencing, \$1,275.52.*—This item is for the cost of wire fencing and lumber amounting to \$2,630.52, less salvage offer of \$1,355. It was considered necessary and desirable to erect a fence around the testing field where the tractors were proven in order to protect the tractors and conceal the work from the public. A fence was built for this purpose under the direction and instruction of officers of the Government, who considered the fence necessary for the purpose outlined above. The amount was audited and approved by the District Board and allowed by the Ordnance Section. The item is one proper for allowance and the amount reasonable. The action of the Ordnance Section with reference to this item is therefore approved.

9. (i) *Storage on Government equipment, etc., \$39,297.45.*—The original amount claimed by the Reo Co. under this item amounted to \$29,942 for storage, embracing various areas and periods of time at a monthly rate of 5 cents per square foot. The District Ordnance Claims Board—

“reduced the amount to \$3060.85 because the rate claimed is in excess of contractual provisions, because the contract was interpreted to require free storage for 60 days, and because it held that not all the space for which the appellant claimed rental was occupied by Government property. There was no conclusive evidence at the hearing (before the Ordnance Section); but it was alleged by counsel that while the Government materials did not occupy the entire truck plant, there was such occupancy as to prevent the appellant's use of said plant up to July 1, 1919 and even after that. This

allegation was not controverted and appears to be entirely reasonable."

Claimant's contention is that the cost accountant's interpretation of the contract as requiring 60 days free storage is erroneous; that the limitation of the storage rate to 10 per cent per annum applies only to storage for 60 days following termination; and that storage thereafter is to be at a reasonable rate. The claimant filed with the Ordnance Section a detailed statement based upon this theory, by which the figures of the original item were increased to \$49,460.60. The Ordnance Section took the position that a written notice by the contracting officer given within 60 days after the completion of the contract, or the termination thereof, was a condition precedent to storage by the contractor, and as no evidence was adduced that such written notice had been given the 10 per cent provision of Article X of the contract was not applicable. That Section allowed a monthly rental of 3 cents per square foot covering all indoor storage of Government property for the various periods occupied and an allowance of \$0.001 per square foot of yard space for the time occupied, making a total award of \$39,297.45. To neither position does this Board subscribe. It is clear that the provisions of the contract did not contemplate free storage. It is equally clear from a reading of Article III and Article X of the contract (quoted above) that the parties had in view that the payment of a reasonable rental should apply to all storage required by the Government in connection with this contract. Nor was a written notice by the contracting officer a condition precedent to the Government right to demand storage. Rather is it apparent that a reasonable construction of the contractual provisions is to the effect that in the absence of any instructions to the contrary the claimant should store articles and materials in accordance with the two articles of the contract applicable thereto. Therefore we deem the proper method of determining the amount allowable under this item to be the determination of such portion of the claimant's plant and land as was necessarily occupied by tractors and Government materials, together with such additional area of the use of which the Reo Co. was necessarily deprived, the periods over which such occupation and such deprivation extended, and the payment to the claimant company of a reasonable rental as may be agreed upon, in no event to exceed 10 per cent per annum on the cost to the claimant company of such lands and buildings.

The decision of the Ordnance Section with reference to this item is therefore vacated. The Ordnance Section being in possession of the figures, the claim will be returned to that Section for computation of the proper amount payable under the method outlined above.

10. (j) Withdrawn by the claimant.

11. (*k*) *Interest on machine tool costs, \$23,072.98.*—This item covers interest on the cost of certain machine tools purchased by claimant, reimbursement for which is claimed under item (*s*) of the set-up. The sum is not allowable under the terms of the contract, the provisions of the pamphlet "Definition of cost," hereinbefore referred to, or the well-established rule that, in the absence of statutory provision, or the terms of a specific contract, no interest accrues upon claims against the Government. The action of the Ordnance Section in denying this item is approved and the item disallowed.

12. (*l*) *Cost of special accounting organization, \$22,808.74.*—It appears from the evidence that the claimant company had considerable difficulty in meeting the requirements of the Cost Accounting Section in furnishing proper statements of costs requisite to reimbursement. After the contract had been terminated, therefore, the Reo Motor Co. employed the services of the Detroit Trust Co. for the purposes of accounting and setting up the various items of cost for which they sought payment from the Government. The evidence is clear that these services were obtained by the contractor upon its own initiative and responsibility and solely for its own benefit in facilitating the presentation of its claims; that no direction, instruction, or authority was given for same by any officer or agent of the Government. The sole provision of the contract having a bearing upon this point is paragraph 5 of Article V of the contract quoted above. It is clear that there was no desire on the part of the Government to establish any cost or accounting system other than that in use by the claimant company. Nor can this item be properly construed as an item of cost "applicable to and necessary in connection with the articles contracted for." The action of the Ordnance Section in disallowing this item is therefore approved.

13. (*m*) *Withdrawn by the claimant.*

14. (*n*) *Balance of compensation or profit due under contract (to which is to be added necessary additions because of items of cost included in present claim), \$272,389.44.*—This item is presented by claimant upon the theory that certain sums which may be the subject of allowance under the present claim are items of cost applicable to the contract upon which the company will be entitled to the 10 per cent profit allowed under the termination clause. The provisions of the contract, construed in accordance with the provisions of the "Definition of cost" pamphlet, are clear with reference to the expenditures upon which any additional compensation or profit may be claimed. In the opinion of this Section no item of the present claim upon which any award is made by this decision comes within the provisions of the contract or said pamphlet so as to constitute a

cost upon which the 10 per cent compensation can be allowed with the exception of item (o). With that exception, the item is disallowed without prejudice to the claimant's right to any balance of compensation which may be due on proper expenditures within the terms of the contract.

15. (o) *Unabsorbed overhead and administrative expenses due to delay in receiving plans, \$118,994.61.*—This claim was presented in another form under item (d) before the District Claims Board. Before the Ordnance Claims Board item (d), item (p), and the present item (o) were presented in the alternative as different methods of setting out practically the same claim. Before the Appeal Section the claimant abandons the theory of items (d) and (p) and confines its claim to the present item. The Ordnance Claims Board made an award of \$65,230.25. It is the contention of the claimant that that sum is wholly inadequate.

The contract in fixing the schedule of deliveries provided that:

"These dates are fixed on the assumption that approved drawings are supplied by December 31, 1917, and if not supplied by that date, delivery date will be adjusted to take into account the delay in supplying drawings."

The testimony is to the effect that the Reo Co., immediately after the execution of the contract, proceeded with the reorganization of its plant and machinery and the perfection of an administrative organization for the purpose of performance of the contract. The drawings were not delivered prior to December 31, nor for some time thereafter, and claimant company was subjected to additional expense in holding together its organization in readiness for work upon the contract, which has not been absorbed. The Ordnance Department allowed an extension of four months in delivery dates in recognition of the Government's failure to deliver the drawings on time. That the Reo Co. is entitled to reimbursement for such additional expense as can be shown to have been actually sustained by reason of the delay is undisputed. The difficulty arises from the fact that separate accounts were not kept by the Reo Motor Co. for the Government contract, as advised in paragraph 3 of the pamphlet "Definition of cost pertaining to contracts," heretofore referred to. Counsel for claimant has stated that their method of setting up the item "is not altogether correct, because the methods of accounting in the Reo plant prior to the time of this contract were not devised for accurately distributing administrative and general expense. The factory expense and overhead are all very well shown, but the administrative expense—that we have to make something of a guess."

The overhead, based upon comparative labor hours devoted to the Government contract and to commercial work of the claimant, has

been absorbed by the contract. This the company contends is entirely inadequate by reason of the delays before referred to. The company sets forth the following table as determining the proper overhead rate in comparison with the normal percentage during the corresponding four months of 1917:

“Unabsorbed Factory and General Administrative Overhead.

Factory.	Overhead summary # 10.	Productive labor total.	Overhead rate %.	1917 O. H. rate.
Jan. 1918.....	\$152,980.58	\$131,385.72	116.43	117.40
Feb. 1918.....	214,639.80	145,467.49	147.55	117.40
Mar. 1918.....	211,981.09	158,758.86	133.52	117.40
Apr. 1918.....	223,148.23	164,880.18	135.34	117.40
	Percentage increase.	Percentage absorbed by Govt.	Difference unabsorbed percentage.	Unabsorbed overhead on basis of increased percentage.
Jan. 1918.....	.....	.895	.....	.....
Feb. 1918.....	30.15	03.6080	26.5420	\$56,969.70
Mar. 1918.....	16.12	04.5997	11.5203	24,420.85
Apr. 1918.....	17.94	05.2601	12.6799	28,294.97
	Administrative and general.			.
Jan. 1918.....	\$23,646.90	(Same per- centages ap- plied as in factory over- head.)	.....	.....
Feb. 1918.....	15,433.85		26.5420	\$4,096.45
Mar. 1918.....	17,315.37		11.5203	1,994.78
Apr. 1918.....	25,377.67		12.6799	3,217.86
Total.....	.....	.....	.....	\$118,994.61”

The Ordnance Section takes the position that it is not proper to measure this excess overhead by comparison of this period with the corresponding months in 1917. They decided that the fairest method is to compare the overhead rate for the period of delay with that for the four months immediately preceding. Their estimate and results are set forth in the following table:

“First four months, 1918.

Direct labor.	Factory overhead.	Adm. overhead.
Total.....	\$639,061.24	\$76,111.82
U. S.	17,820.81	2,652.81
	621,240.43	73,459.01
	Total Com'l overhead.	Rate.
	\$638,992.08	135.05%

“ Last four months, 1917.

	Factory overhead.	Administra- tive.
Sept. 1, 1917 to Aug. 31, 1918 (D. T. Co.)	\$2, 656, 229. 71	\$249, 863. 16
1st 8 months, 1918.....	1, 837, 846. 92	157, 679. 99
Last 4 months, 1917.....	818, 382. 79	92, 183. 17

Factory.....	\$818, 382. 79	
Administrative.....	92, 183. 17	
Total.....	910, 565. 96	
Direct labor.....	731, 055. 32	
Rate.....		124. 55%
Excess rate.....		10. 50%
Commercial Labor, period of delay.....		\$621, 240. 43
Excess rate.....		. 1050
Excess overhead.....		\$65, 230. 25

“ Under the foregoing computation, it is recommended that the ap-
pellant be awarded \$65,230.25 as reimbursement for damage resulting
from the Government’s delay.”

In the view of this Board, neither of the methods set forth above is
the proper one for determining the amount due under this item of the
claim. We consider that the most satisfactory method for fixing the
proportion of overhead which should be borne by the Government
would be by comparison of the period in question with a month in
which the claimant company was maintaining a fair average produc-
tion under the Government contract in question. By taking the total
deliveries for the four months—September, October, November, and
December, 1918—we find that the average delivery for the four
months was approximately identical with the number of tractors de-
livered during the month of November.

It is safe to assume that the Reo Co. could not have gotten into pro-
duction during the month of January nor the first half of February,
even had the drawings been delivered at the time specified in the con-
tract. Therefore, we consider it proper that no unabsorbed overhead
for the month of January should be charged to the Government and
that one-half of that for February should be eliminated. The
amount of the item should then be computed by comparing the re-
maining two and one-half months with the month of November, 1918,
at which time the claimant had attained average production under
the contract. This Board has not at hand the proper figures to de-
termine the result. The Ordnance Section has those figures.

The award of that Section with regard to this item is hereby va-
cated and the claim returned to the Ordnance Section for determina-
tion of the amount properly payable under computation in the man-
ner outlined above. In so far as this item is concerned, any amount
found to be payable is proper for consideration in connection with
the balance of compensation or profit due undner the contract (item
(n) above).

16. (p) Withdrawn by the claimant.

17. (q) *Unabsorbed overhead and administrative expenses following termination, \$320,212.78.*—Article IX of the contract with the Reo Co. provides that in the event of termination without default on the part of the company, the company

“shall be paid a sum which together with all fixed profit theretofore paid shall be equivalent to ten (10%) per cent of all cost which the United States shall have previously paid and shall then be obligated to pay * * *. In the event of the termination of this contract as aforesaid any and all obligation of the United States to make any payments to the Contract or hereunder, other than those specified in this Article IX shall at once cease and determine.”

The claim is presented on the theory that the claimant was subjected to extensive overhead expense subsequent to the sudden termination of the contract by reason of the presence of Government material and the necessity of devoting a considerable part of the energies of its administrative offices to the winding up of the work. Very little, if any, testimony was presented in support of the claim, nor do we feel that such testimony would be pertinent. The item is clearly not allowable under any construction which might be placed upon the contract. This item is therefore disallowed.

18. (s) *Cost of machine tools (about), \$255,000.*—This item has reference to machine tools purchased by the contractor for the performance of the contract, and has been the subject of much controversy between the claimant company and various officers of the Government. The officer negotiating the contract has stated that the terms “machinery” and “machine tools” were used interchangeably in the negotiation of contracts, and they will be so used here.

Very soon after the contract had been executed it became apparent not only to the contractor but to the officers of the Government that it would be necessary to acquire a large amount of additional machinery in order properly to perform the contract. Various officers of the Ordnance Department urged the claimant to purchase said additional machinery, and pursuant thereto the Reo Motor Car Co. proceeded with the purchase of machine tools, motors, shafting, belting, etc., which eventually aggregated in amount approximately \$255,000. The machinery was purchased with the full knowledge and concurrence of the Government officers connected with the performance of the contract. Upon its arrival at the factory it was marked and at all times treated as Government property. No doubt existed in the mind of any one that its purchase was authorized under the terms of the instrument. When reimbursement was sought, however, the accounting section took the position that Article II of the contract could not be construed to authorize reimbursement for the

purchase of the machinery, and that the word "tools" in paragraph 6 of Article V could not be construed as including machine tools.

- Thereupon the claimant company obtained from Maj. Hawkins, contracting officer for the Ordnance Department, a letter stating that "the contracting officer construes subdivision six (6) of Article V of the contract dated November 11, 1917, as follows:—

The word 'tools' includes machine tools, hand tools, and small tools."

The accounting section still adhered to its refusal to pay for the machinery. Thereafter, in February, 1919, a "procurement request" was drawn up to cover the cost of machine tools. This, however, was not delivered to the claimant, and was apparently issued to be used as evidence to establish a "Class A" claim under the act of March 2, 1919. The contractor was advised to file a claim under the Dent Act, and on January 17, 1920, an award was approved by the Ordnance Claims Board covering the cost of the machinery. The award was not approved by the special member of the War Department Claims Board assigned to Ordnance, but was referred by him to the War Department Claims Board for consideration.

The chairman of the standing committee, War Department Claims Board, by a memorandum dated March 9, 1920, advised the special member of the War Department Claims Board accredited to the Ordnance Section that it was the opinion of the standing committee that: "The articles of the contract in question can not be interpreted to allow the contractor the cost of machine tools and special facilities, for the reason that the word 'tools' as used in the phrase 'patterns, dies, tools, jigs, fixtures, etc.' means only expendable tools."

This memorandum further states:

"The provision of Article V of the contract that 'further allowances of cost from time to time may be allowed by the contracting officer' is to be interpreted as meaning such items of cost as are analogous to items previously specified in the same article, viz: dies, tools, jigs, fixtures, etc. These words can not be held to include machine tools and special facilities by either description or analogy. It should further be noted that Article II, although capable of a possible interpretation allowing the cost of special facilities, must be held to be governed by the more specific language contained in Article V, under which article special facilities are not included."

This memorandum was based on a resolution of the standing committee of March 4, 1920. The standing committee was of the further opinion that the procurement request was not proper evidence of a previous agreement between the contractor and the officers of the government, and that the action of the Ordnance Claims Board in issuing Certificate "C" was not justified by the record.

The Ordnance Claims Board thereupon determined that the right of the contractor to reimbursement was under the formal contract.

and again requested the cost-accounting section to issue vouchers covering the amount properly due. The cost accountant in Detroit declined to prepare the vouchers, whereupon the Ordnance Claims Board once more referred the matter to the War Department Claims Board, under date of May 19, 1920, recommending that vouchers be prepared and submitted to the disbursing officer for payment. The recorder of the standing committee, War Department Claims Board, acting under the authority of the committee of May 21, 1920, by an indorsement dated May 22, 1920, advised the Ordnance Claims Board that the standing committee adhered to its former view of the matter. The item was disallowed in the award by the Ordnance Section, which award includes an item of \$20,949.84 for depreciation on the machine tools in controversy. This amount the claimant company has refused to accept, and, insisting on its right to reimbursement under the contract, appeals to this Section.

The standing committee, War Department Claims Board, by resolution of April 7, 1921, rescinded the action taken by said committee under date of March 4, 1920, which was the basis for the memorandum of March 9, 1920, to the Ordnance Claims Board.

Article II of the contract has been quoted above. That article provides that the contractor shall furnish—

“with the utmost dispatch, *at the best prices obtainable* * * * (2) such plant, machinery, tools and other facilities * * * as may be necessary to enable the articles to be made and all the requirements in respect of the storage and delivery of the articles contemplated herein, to be complied with in manner satisfactory to the contracting officer.”

The following rules for the construction of contracts are applicable in connection with this article:

(1) No word in a contract is to be treated as a redundancy, if any meaning, reasonable and consistent with other parts, can be given to it. (Century Digest, Contracts, par. 732.)

(2) Individual clauses and particular words must be considered in connection with the rest of the agreement, and all parts of the writing, and every word in it, will, if possible, be given effect. (13 C. J. 527.)

(3) The words of a contract will be given a reasonable construction, where that is possible, rather than an unreasonable one, and the court will likewise endeavor to give a construction most equitable to the parties, and which will not give one of them an unfair or unreasonable advantage over the other. (9 Cyc. 583.)

It is incumbent upon the Board, therefore, to give meaning and effect to the phrase “at the best prices obtainable,” appearing in Article II. The reasonable construction to be placed upon the phrase is that the Government contemplated paying for such machinery, etc.,

as was installed for the performance of the contract as a part of the "cost," and took this means to protect itself in the matter of such expenditures. If, under the contract, the claimant was to bear the expense of the machinery the phrase "at the best prices obtainable" would be needless. The Government would have no direct interest in the prices, and the company could be relied upon to obtain the machine tools at the best possible prices. The only question that could arise under this article was whether or not the additional machine tools were necessary to enable the provisions of the contract to be complied with to the satisfaction of the contracting officer. The fact that officers representing the Ordnance Department repeatedly and insistently urged their acquisition by the contractor abundantly answers that question in the affirmative; and the evidence is further conclusive that the purchase and use of said machine tools resulted in large saving, both of time and money, to the Government.

Article V of the contract has been quoted above. The "Definition of cost pertaining to contracts" referred to in that article "for the guidance of the Contracting Officer and the Contractor as to the specific items of cost which will be allowed under the foregoing four general definitions" (pars. 1, 2, 3, and 4) contains the following:

"21. Temporary buildings, machinery, equipment, etc., purchased by the contractor upon the authority of the contracting officer for use in connection with manufacturing the articles contracted for, which equipment becomes the property of the United States, shall not be classified as direct materials upon which any percentage of profit shall be paid to the contractor. The cost of the same shall be reported to the Ordnance Department on forms provided therefor.

22. Labor performed by the contractor in connection with the setting, erection, or construction of such equipment shall be subject only to the overhead expense that applies to the department of the contractor's plant that furnishes the labor, such as direct supervision thereof, time keeping, and expense incidental thereto, and a reasonable allowance for factory management, general plant expense, or administrative expense.

23. The total cost of such equipment, including erection or setting, shall not be subject to any addition for profit to the contractor as aforesaid unless otherwise specified in the contract or approved in writing by the contracting officer.

24. The contractor shall, as he may be called upon by the contracting officer, furnish complete detailed inventories of the property of the United States in the custody of the contractor."

This excerpt from the pamphlet clearly shows that while machinery, equipment, etc., were not to be included in the direct materials *on which a profit was to be allowed*, the actual cost of such equipment, together with the cost of erection and setting, should be regarded as a proper item of cost for which reimbursement was to be made to the contractor.

The blanket clause of Article V provides that—

“In addition thereto, further allowances of cost from time to time may be made by the contracting officer.”

In the view of this Board the “cost” contemplated in that paragraph can not properly be interpreted as meaning only such items of cost as were analogous to the items previously specified in Article V. The only doctrine under which such a contention could be made is that of “ejusdem generis.” That doctrine may be broadly stated to be that when general words are used in a contract after specific terms the general words will be limited in their meaning or restricted to things of like kind and nature with those specified. The doctrine is not applicable in the instant case. The following rule was laid down by the Supreme Court in *U. S. v. Mescall*, 215 U. S., 26, 54 L. Ed., 77, 30 Sup. Ct., 19:

“Whilst it is aimed to preserve a meaning for the particular words it is not intended to render meaningless the general words. Therefore, where the particular words exhaust the class, the general words must be construed as embracing something outside that class. If the particular words exhaust the genus, there is nothing ejusdem generis left, and in such case we must give the general words a meaning outside of the class indicated by the particular words, or we must say that they are meaningless, and thereby sacrifice general to preserve particular words. In that case the rule would defeat its own purpose.”

By an examination of paragraphs 1, 2, 3, 4, 5, and 6 of Article V it is readily apparent that each paragraph exhausts the class of items to which it specifically refers. The specific reference to the “Definition of cost pertaining to contracts” serves further to include and exhaust all items of cost which might be considered analogous to those specified, leaving nothing to which the doctrine of ejusdem generis can possibly apply. Therefore, in accordance with the principle laid down above, the provision that “further allowances of cost from time to time may be made by the contracting officer” must be held to be a provision of more comprehensive content. It is not limited to costs analogous to those theretofore set forth, and is unquestionably broad enough to include the cost of the machine tools provided for the performance of the contract.

That the contractor was authorized and instructed to purchase these machine tools by officers of the Ordnance Department is undenied. Very shortly after the contract was signed the plant of the Reo Motor Car Co. was visited by various officers of the Ordnance Department, who in every instance urged the contractor to procure promptly and without standing on formality such additional machine-tool equipment as the situation required. When the purchases of such equipment were made, the prices were approved by Lieut. Ash, price approving officer assigned to the Maxwell and Reo plants, and

forwarded to Washington for formal approval. On January 23, 1918, a letter signed by H. W. Reed, Lieutenant Colonel Ordnance Department, N. A., was written to Lieut. Ash, reading in part as follows:

"It is the desire of this Section that all orders for machine tools, such as milling and boring machines, lathes, planers, grinding machines, etc., be tentatively approved in this office before they are formally approved by the officer assigned to the duty of approving prices. In order to prevent any delay in placing the order, you are authorized to permit the contractor to place the order subject to the approval of this office. A copy of the order or list of the machines, giving the prices to be paid, should be forwarded to this office by you, which will be acted upon and returned at once with instructions to you to approve or disapprove."

This letter clearly indicates not only that the Ordnance Department recognized the necessity for the acquisition of additional machine tools, but that it was contemplated that the Government was to pay therefor. Hence the care exercised by the Ordnance Department in approving the prices paid for machinery.

Under the instructions contained in said letter, Lieut. Ash approved the purchase by the Reo Co. of a number of machine tools, aggregating in cost approximately \$70,000. Thereafter, on or about March 22, 1918, another letter from Col. Reed to Lieut. Ash read as follows:

"Enclosed herewith are copies of orders recently received from you with request for approval from this office. Several days ago Capt. Owston was advised to notify the price approving officers in his district not to approve any more machine tools for any of the contractors who did not have an appropriation, or who have not secured permission from the Procurement Division to purchase same. You are not to approve any orders or issue any reports of approved purchases on machine tools purchased by the contractor without knowing that they have made arrangements with the Procurement Division, or have been granted an allotment for increased facilities. This matter should be taken up with the Government cost accountant so that payment will not be made on any purchases for machine tools which have already been approved by you, as several orders were forwarded to this office and approved by Lieut. Ritter for prices before it was learned that there had been no appropriation granted."

This letter also clearly recognizes that the purchase of additional machine tools was covered under the contract. But since the duty of approving purchases had been transferred to the Procurement Division it was deemed necessary to get the authority of that Division before the purchase of additional machinery should be approved by the price approving officer at the plant of the contractor. On May 4 the contractor wired to Maj. Glover, of the Procurement Division, as follows:

"We are referred to you by the Engineering Bureau relative to the question of machine tools in connection with the production of tractors. We wired facts in this connection to Department above referred to on May first. Do you intend cancellation of orders for machine tools not yet delivered and subletting all work that cannot be done with our present equipment? This means delay and extravagant cost that will amount to more than the cost of machine tools.

(sgd) R. H. SCOTT,
General Manager, Reo Motor Car Company."

This telegram clearly shows the construction put upon the contract by the Reo Motor Car Co., and that construction was that the Government was authorizing the purchase of the additional machinery and was to pay therefor. The fact that the Ordnance Department did not reply to the questions propounded in that telegram and allowed the contractor to proceed with the purchase of further machine tools must be construed as a recognition of, and a concurrence in, the construction placed upon the contract by the Reo Motor Car Co.

Article VI of the contract speaks of "all increased facilities, etc." Article VIII refers to "all plant and equipment supplied to the contractor by the United States." Article XI alludes to "the increased facilities, material, supplies, or property, for which the United States shall pay * * *." In the opinion of this Board, "increased facilities" is to be construed to include the additional machine tools purchased by the contractor, and the references cited above make it perfectly clear that while the parties might not have contemplated the immediate necessity for acquiring additional facilities, they were certainly not unmindful that the possibility therefor might arise, and intended that in such event the increased facilities, additional machinery, and further equipment should be paid for by the Government as a part of the cost of the contract, and should become Government property.

That the Reo Motor Car Co. is entitled to reimbursement for the machine tools purchased has at all times been held by the contracting officers of the Ordnance Department, who have sought in various ways to alter the attitude of the cost accounting section. A survey of the entire contract and a consideration of the circumstances surrounding the parties at the time of its execution lead inevitably to the conviction that this is the only reasonable and equitable construction to place upon the instrument. Time was of the essence. The need of the Government was urgent for the articles covered by the contract. The manufacture of the tractors was practically a novel undertaking. No one had attempted to produce them on any extensive scale. Changes in the plans and specifications were constantly being made in the effort to perfect the articles. The Reo

Co. undertook their manufacture at cost plus the stipulated profit. Such plant and machinery as the claimant possessed were placed at the disposal of the order. They might prove adequate. If so, no additional purchase need be made. On the other hand, much additional equipment might be required, and this the company was bound to provide "with the utmost dispatch at the best prices obtainable." The evidence is to the effect that the machine tools in question were necessary for the performance of the contract; that they served to expedite the work, and accomplished a saving to the Government of approximately \$1,000 per tractor over the cost paid for similar tractors manufactured by another concern.

It would be unreasonable and unconscionable to contend that it was contemplated by either party that the Reo Motor Car Co. was to purchase additional machinery (much of it unsuitable for its own commercial business) solely for the performance of the contract, and thus reduce the profit which the company would receive on the manufacture of 3,000 tractors, by approximately 33½ per cent. Such a construction would result, to say the least, in giving the United States an exceedingly unfair and unreasonable advantage over the other party to the contract. The contract was cost plus a fixed profit. The contractor, therefore, could derive no benefit from the acquisition of the increased facilities. Any and all profit resulting inured to the United States. Under the circumstances, and in view of the provisions of the contract, we do not consider the question as to whether the necessity for additional machine tools was contemplated at the time the contract was executed, or became apparent at a later date, is at all material.

Maj. Hawkins, contracting officer for the Ordnance Department, has held that the word "tools" appearing in paragraph 6 of Article V should be construed as including machine tools, hand tools, and small tools.. That decision we do not discuss except to say that while some doubt might arise as to the correctness of the construction under the principle of *noscitur a sociis*, it certainly shows clearly the intent of the Ordnance Department in the premises, and is therefore entitled to great, if not controlling, weight in determining the proper interpretation to be placed upon the word.

Claimant company is entitled to reimbursement for the actual cost of machinery purchased. It appears from the record that some of this machinery has already been disposed of and that claimant company has made an offer to the Government of 85 per cent of the cost price for certain other articles. This Board will recommend that in determining the amount to be paid under this award proper deduction be made for the machinery sold; claimant's offer of 85 per cent cost on other portions be accepted; any additional articles

claimant may desire be turned over at the fair market price at the time of settlement; and if any of the machinery in question has been used by the company in its commercial business, a proper rate of depreciation on such machinery be charged to the contractor.

19. (t) *Cost of plant rehabilitation (Amount not determined).*—It appears that in order to facilitate tractor production at the Reo plant much machinery, equipment, tools, etc., were rearranged and moved from one part of the plant to another. The claimant will now necessarily have to arrange the plant once more in conformity with the best interests of its commercial production. As this work has not been completed, claimant does not state an amount, but seeks approval of the principle involved. The claimant therefore proceeds upon the theory that the cost of said rearrangement of plant is a proper item chargeable to the contract and should be borne by the Government. To this proposition we cannot accede. No provision of the contract could be so construed as to charge the Government with any responsibility or liability for the cost of a possible rearrangement of claimant company's plant either before or after the performance of the contract. The provisions of that instrument quoted above in connection with item (q) are equally applicable in this instance. This item, therefore, in whatsoever amount the claimant may seek to recover is hereby disallowed.

DISPOSITION.

Pursuant to the resolution of the standing committee, War Department Claims Board, of date April 7, 1921, the Appeal Section will transmit to the Ordnance Section a copy of this decision *with all papers attached thereto as required by the above resolution*, with instructions to determine the amounts due the Reo Motor Car Co. in accordance herewith, prepare the necessary papers, and transmit same through the Director of Finance to the Auditor for the War Department for direct payment.

Lieut. Col. McKeeby and Capt. Taylor concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

APRIL 27, 1921.

Case No. 3069.

In re CLAIM OF LAWRENCE F. CASHMAN, TRUSTEE IN BANKRUPTCY FOR
BELL MANUFACTURING CO.

1. "CONSTRUCTIVE COMMANDEERING" OF CONTRACTOR'S PLANT.—A claim based on the alleged "constructive commandeering" of the contractor's plant by officers of the Ordnance Department is not sustained by proof that the contractor agreed to and acquiesced in substantially every act which claimant has alleged amounted to said "constructive commandeering" of its plant by Ordnance officers.
2. INCREASED FACILITIES.—Where a supplemental agreement with the contractor provided for the erection of a heat-treating plant which was to be paid for by, and become the property of, the United States, the estimated cost of which was placed at \$12,000.00, but the actual cost of which was in excess of \$16,000.00, the contractor is entitled to reimbursement to the extent of the actual cost of said heat-treating plant.
3. CLAIM AND DECISION.—Appeal from award of the Ordnance Section on a Class A claim. Held, (1) the award of the Ordnance Section is affirmed. The contractor is only entitled to reimbursement to the extent of the total cost of the increased facilities provided for in the supplemental agreement. (2) There was no "constructive commandeering" of the contractor's plant by officers of the Ordnance Department.

Capt. Taylor writing the opinion of the Board.

FINDINGS OF FACTS.

The Appeal Section finds the following to be the facts:

1. This is a Class A claim presented under the act of March 2, 1919, and is before the Appeal Section, War Department Claims Board, on appeal by the trustee in bankruptcy from an award by the Ordnance Section in the sum of \$4,182.45. The amount which claimant seeks to recover is \$158,829.24.

2. The circumstances giving rise to this claim are as follows: On December 10, 1917, Procurement Order, War Ordnance, G1092-585A, was issued by the Ordnance Department to the Bell Manufacturing Co., of Fairmount, Ind., a corporation organized under the laws of the State of Indiana. This procurement order called for the machining of 75,000 4.7-inch common steel shells at \$5.25 each, the United States to furnish the forgings, copper bands, and base covers. Delivery of finished shells was to be as follows: January, 1918, 5,000, and 10,000 each month thereafter until the contract was completed in August, 1918.

3. A written contract, being contract No. 196, covering the above procurement order, and dated January 1, 1918, was entered into between the Bell Manufacturing Co. and the United States. This contract is signed on behalf of the United States by Samuel McRoberts, Colonel, Ordnance Department, N. A., as contracting officer, by R. P. Lamont, Lieutenant Colonel, Ordnance Department, N. A.

4. At the time the above contract was entered into the Bell Manufacturing Co. was incorporated for \$50,000, practically all of this stock being owned by A. B. Scott, who was at that time secretary and treasurer of the company. His son, E. L. Scott, was its president. The company owned a small plant which had been equipped to manufacture glass articles. The company had had no experience in manufacturing shells, though A. B. Scott, as president of the Bell Bottle Co., had had some experience in making 3-inch shells on a contract which that company had with the Russian Government. The contractor's plant was not equipped to manufacture shells, nor was it financially able to handle the contract in question. Before any work was started on the contract the contractor was obliged to borrow money from the Marion National Bank, of Marion, Ind., and as work progressed it became necessary to make additional loans from that bank.

5. Production on shells was greatly delayed. Claimant's witnesses attributed the delay to changes in specifications and to the failure of the Army inspectors to permit the tolerance authorized by the specifications. However, it is clearly apparent from the evidence that the delay was primarily due to lack of facilities and an insufficient organization.

The original contract made no provision for heat treating the shells. The Ordnance Department decided to have the shells heat treated, and on March 19, 1918, a supplemental contract was entered into by the terms of which an advance payment of \$32,000 was made by the War Credits Board, \$12,000 of which was to be used in the erection of the heat-treating plant, which was to be paid for by and remain the property of the United States. The advance was, therefore, really only for \$20,000. The heat-treating plant was not finished and in operation until August, 1918. However, work continued on shells which would pass inspection without undergoing the heat-treating process.

In the meantime work on shells was not progressing satisfactorily to the Ordnance Department. Early in 1918 Lieut. L. H. Weller, of the Production Department, was assigned to the contractor's plant as production supervisor. He at once recommended that the contract be canceled because of claimant's lack of facilities and finances and an inefficient organization, but this recommendation, unfortunately, was not approved.

6. On April 16, 1918, the chief of the Cincinnati District Ordnance Office, after an investigation of the situation at the contractor's plant, appointed Mr. G. H. McCulloch, Mr. Edwin F. Leigh, and Mr. Samuel H. Smith an "advisory committee" to assist the contractor in carrying out the contract in question. Mr. McCulloch was president of the Marion National Bank, and his appointment was primarily due to the fact that his bank was the principal creditor. He took little interest in the contractor's affairs, but Mr. Leigh and Mr. Smith devoted considerable time to the various problems that arose in connection with the performance of the contract. Appointment of this advisory committee met with hearty approval by A. B. Scott.

On June 5, 1918, the contractor was not able to meet its pay roll. A. B. Scott, Lawrence F. Cashman, who was then secretary-treasurer of the company, and Lieut. Weller went to Cincinnati to discuss the situation with C. L. Harrison, district chief. As a result of that conference it was decided to negotiate a further advance in the sum of \$25,000 from the War Credits Board. As the management of affairs at the contractor's plant was wholly unsatisfactory to the Ordnance Department, Mr. Harrison and Lieut. Weller informed Mr. Scott that before they would approve the application for the advance from the War Credits Board he would have to agree that a new manager for the plant be selected who would have absolute charge of the plant. Mr. Scott agreed to this arrangement, and the \$25,000 advance was approved by Mr. Harrison and Lieut. Weller.

On June 19, 1918, the War Credits Board entered into a second supplemental agreement with the contractor, under the terms of which an additional advance of \$25,000 was made to the contractor. This agreement recites that the advance is to be repaid by the Disbursing Officer deducting 20 per cent of the amount of each voucher presented by the contractor for finished shells. However, it appears that the War Credits Board consented that, in consideration of an additional loan of \$5,000 by the Marion National Bank to the contractor, said bank should be repaid by deducting 10 per cent of the amount of each voucher presented by the contractor for finished shells. By this arrangement the War Credits Board and the bank would share equally in the 20 per cent deduction from the amount of each voucher. This arrangement was to continue until both the War Credits Board and the bank had been paid in full. The advance by the War Credits Board was secured by the contractor's note and by \$40,000 of the capital stock of the Bell Bottle Co., which stock A. B. Scott alleged was his property and which was placed as collateral security for the \$25,000 advance. The Cincinnati District Ordnance

chief also required all checks drawn by the contractor on funds in bank to be countersigned by a member of the advisory committee.

7. Pursuant to the agreement that a manager satisfactory to the Cincinnati District Ordnance Office and to Lieut. Weller should be placed in charge of the plant, Mr. Ronald C. Green was selected to be manager of the contractor's plant, and he assumed the duties of manager on June 17, 1918. Apparently A. B. Scott and the other officers of the company were entirely satisfied with Mr. Green's management of affairs at the plant. The testimony is to the effect that Mr. Scott seemed particularly anxious that Mr. Green should have absolute authority at the plant.

8. About July 1, 1918, Lieut. Weller discovered that the stock of the Bell Bottle Co. placed with the War Credits Board by A. B. Scott as collateral security for the second advance was an overissue of the stock of that company. Thereupon Lieut. Weller instructed Mr. Green not to permit A. B. Scott to come about the plant. However, it does not appear that Mr. Scott made any attempt to come on the premises. He was in poor health at that time, and shortly thereafter went to California, where he died on October 3, 1918.

About July 15, 1918, O. J. Scott, a cousin of A. B. Scott, was discharged as superintendent of the plant by Mr. Green, on orders from Lieut. Weller. Lieut. Weller testified that O. J. Scott was a socialist and that he had been causing trouble among the employees at the plant and that this was the reason for his discharge.

In the latter part of July a reorganization of the directors and officers of the Bell Manufacturing Co. was accomplished. Mr. A. B. Scott's son, Merle Scott, became a director and also purchasing agent for the company, and the wife of A. B. Scott became a director, A. B. Scott withdrawing from any participation in the affairs of the company. Mr. Cashman continued as secretary-treasurer of the company.

9. Work on the contract continued with Mr. Green as manager, Mr. Cashman as secretary and treasurer, and Mr. Merle Scott as purchasing agent.

Creditors of the company were not being paid. They were insistent that their accounts be paid, and some of them even threatened to bring suit to enforce payment. They were told by Mr. Cashman that there were no funds with which to meet the obligations, but that the company was working on a Government contract, that the advisory committee was cooperating with the company, and that the contract would be carried to completion and all creditors paid in full. It appears that the advisory committee had requested Mr. Cashman to "stall off" the creditors in this matter.

As a further means of holding off the creditors, a form letter was prepared and mailed to them. The following is a copy of that letter:

"You are probably aware that in pursuit of the Government plan of conducting this war on a strictly efficient basis, proper authorities have seen fit to appoint for several munition manufacturers an Advisory Board, composed of experienced business men, whose only connection with the operating company is that of Government counselor, working with one object in view, namely accelerate production and in that way take a forward step toward an early victory.

"It is in the capacity of advisors to the Bell Manufacturing Company of Fairmount, Indiana, that we address you now. The attention of this Board has been drawn to your account as it appears on the record of that company. We are informed that several communications have been exchanged in connection with the settlement of this account.

"Due to unforeseen delays, the Bell Manufacturing Company has been retarded in its efforts to get on a production basis, which has produced a condition that requires us, in strict conformity with our duties to the Government and in order to prevent embarrassing financial conditions that would delay an early production of shells, to suggest to the officials of the Bell Manufacturing Company that they inform you of these delays and request that you bear with this Company for a short period longer.

"We are firmly convinced, that as a business organization, you realize the unusual conditions existing in connection with turning out war materials, and are also of the opinion that you will be willing to allow a concession in this instance to be made when we inform you that earnest efforts are being made to work up an organization at the Bell Manufacturing plant, that will soon have production started, and in that way secure revenue through operation of assets, which, until now have been inactive.

"Your courtesy in assisting at this time will not only greatly help the Bell Manufacturing Company, in their patriotic efforts to assist the Government, but it will also be treated as a manifestation to the Government of your co-operation in promoting the war against our common enemy.

"Yours, very truly,

"GOVERNMENT ADVISORY BOARD TO

"BELL MANUFACTURING COMPANY,

"(Signed) S. H. SMITH, *Chairman.*"

The above letter dated July 30, 1918, was addressed to one of the creditors. The same letter was sent to other creditors at various times, both prior and subsequent to July 30, 1918.

Some of the creditors were requested to, and did, extend further credit by furnishing additional material, etc., under an agreement that the new accounts were to be paid first and the old accounts to be paid as rapidly as the financial condition of the company would permit.

It does not appear that any representative of the Ordnance Department, or any member of the advisory committee, ever at any time promised any creditor or the contractor that the United States

would assume or guarantee the payment of the obligation of the contractor, nor is it alleged that any creditor of the contractor was induced to extend further credit or refrain from bringing suit to enforce collection of old accounts because of any promises or representations made by any representative of the Ordnance Department or by any member of the advisory committee.

10. By about the 7th of September, 1918, approximately 7,000 shells had been partially processed. Orders were then issued by the Cincinnati District Ordnance Office to finish processing the shells then in process, but to discontinue all other work on the contract. These orders were carried out.

On October 23, 1918, an involuntary petition in bankruptcy was filed against the contractor by certain creditors. Mr. Cashman was appointed receiver and instructed by the court to continue to operate the plant in the manufacture of shells under the Government contract. Work of finishing shells in process was continued. On December 19, 1918, Mr. Cashman was elected trustee in bankruptcy, and it is in that capacity that this claim is presented by him on behalf of the creditors of the contractor.

11. On December 13, 1918, a suspension request was forwarded to the contractor which was accepted by Mr. Cashman, trustee in bankruptcy, on January 1, 1919. The last delivery of finished shells was made about February 2, 1919. Approximately 6,000 finished shells were accepted and paid for at the contract price.

On February 3, 1919, a supplemental agreement was entered into between the trustee in bankruptcy and the Ordnance Department providing for the payment by the United States of 40 cents each for heat treating 3,090 shells. Payment for this has also been made.

12. The assets of the company were converted into cash, amounting to \$28,938.52. The liabilities amounted to \$108,114.02, which includes the claim of the United States in the sum of \$41,020.28, this amount being the balance due on the advance of \$57,000 made by the War Credits Board, after deducting the \$12,000 for the heat-treating plant and the deductions from vouchers which were applied on the advance payments.

The Ordnance Claims Board held that as the heat-treating plant cost \$16,182.45, there was still due the contractor the sum of \$4,182.45 on that item. That Board also held that the contractor had spoiled forgings and other components, the property of the United States, to the value of \$10,074.95, which sum, by the terms of Paragraph 4 of Article III of the contract, the contractor was obligated to reimburse the United States, and that the net amount owing the United States by the contractor was \$46,912.78.

The claim of the United States against the bankrupt for the advanced payments was filed by the United States District Attorney,

and the same has been allowed as a preferred claim. However, the assets of the company are not sufficient to pay this claim, and there will be nothing for the unsecured creditors.

13. The trustee in bankruptcy insists that the United States should make reimbursement for the cost of all machinery, patterns, buildings, furniture and fixtures, interest on borrowed capital, all expenditures made in performance of the contract, and a profit of 10 per cent on the unfinished portion of the contract.

The theory of the trustee in bankruptcy and his attorneys is that there was a "constructive commandeering" of the contractor's plant by the United States, as evidenced by the foregoing statement of facts, and that by reason thereof the United States became liable for all expenditures made and obligations incurred by the contractor in performing the contract, as well as the value of the plant, machinery, equipment, etc., and the profit of 10 per cent on the uncompleted portion of the contract. However, the trustee in bankruptcy will be satisfied if the United States will make reimbursement in an amount equal to the liabilities of the contractor in order that all creditors may be paid in full.

DECISION.

1. This claim properly arises under the act of March 2, 1919. The contract in question was proxy-signed, and therefore not in accordance with section 3744, Revised Statutes. It is such a claim as the Secretary of War is by said act authorized to adjust, pay, or discharge upon a fair and equitable basis.

2. We are unable to agree with the trustee in bankruptcy and his attorneys that there was a "constructive commandeering" of the contractor's plant. The advisory committee appointed by the chief of the Cincinnati District Ordnance Office cooperated with and assisted Mr. Scott and the other officials of the company as long as Mr. Scott acted in the capacity of manager of the plant. The services of this committee appear to have been highly appreciated by Mr. Scott. Certainly the conduct of this committee did not constitute a commandeering of the plant by the United States.

The circumstances under which Mr. Green became manager of the contractor's plant did not constitute a commandeering of the plant by the United States. Mr. Green became manager as a result of the agreement between the Cincinnati District Ordnance Office and A. B. Scott. The agreement was that Mr. Green was to have absolute management of the plant. If this agreement meant anything it meant that Mr. Scott would no longer exercise any authority at the plant. Mr. Scott did not have to agree to this arrangement, and the fact that he did agree to it negatives the idea that the plant was commandeered by the United States.

Neither did the action of Lieut. Weller in ordering Mr. Scott to keep away from the plant for a short time in July constitute a commandeering of the plant by the United States. Mr. Scott had already voluntarily relinquished his authority in favor of Mr. Green. Other officials of the company who continued to proceed in the active management of the affairs of the company were Mr. Cashman, the secretary-treasurer, and Mr. Merle Scott, who was a director and purchasing agent. The testimony was to the effect that all purchases were made upon their representations and not upon the representations of the advisory committee, Lieut. Weller, or any representative of the Cincinnati District Ordnance Office.

3. In February, 1918, the general liabilities of the contractor were \$22,000 and its bank indebtedness \$23,000, or a total of \$45,000. The War Credits Board made advances, the unpaid balance on which amounts to \$41,021.28. This accounts for \$86,000 of the present indebtedness of \$108,000, leaving approximately \$22,000 of the present indebtedness that was evidently incurred after the advisory committee was appointed. If, for the sake of argument, we hold that there was a "constructive commandeering" of the contractor's plant, as insisted by the trustee in bankruptcy, yet we are unable to see why or how the United States became liable for any part of the contractor's obligations beyond those incurred subsequent to the alleged commandeering. It is not insisted that the contractor would have accomplished more on the contract if Lieut. Weller, the advisory committee and Mr. Green had not rendered the assistance they did. As a matter of fact, we are firmly convinced that the facts justify the conclusion that the contractor would have been obliged to abandon the contract as early as June 5, 1918, and possibly earlier, because of lack of finances, had it not been for the assistance rendered by the Cincinnati District Ordnance Office. Would the contractor and the creditors have been in any better position if work on the contract had been suspended on June 5 than they are at the present time? We think not. The contractor was insolvent on that date. It is true that some additional liabilities were incurred after that date, but approximately an equal amount of revenue was derived from shells which were finished and delivered after that date.

4. We find that there was no "constructive commandeering" of the contractor's plant, but that, on the contrary, the representatives of the Ordnance Department rendered all assistance possible to the contractor in an effort to enable it to perform its contract, and that, owing to the lack of proper facilities and finances and an inefficient organization, the contractor was unable to perform its contract and breached the same by failure to make deliveries of shells according to the schedule provided in the contract.

The contractor is only entitled to reimbursement at the contract price for the finished shells actually delivered to and accepted by the Ordnance Department, plus the price agreed upon for heat treating the shells which were heat treated, for all of which the contractor has been paid in full except the 5 per cent retained. Apparently the 5 per cent retained has not been paid, but there is no dispute as to this item. The contractor is, of course, entitled to it if it has not already been paid.

The contractor is also entitled to reimbursement for the cost of the heat treating plant. This has been provided for in the award of the Ordnance Section.

The United States is entitled to reimbursement for shells and other component parts, the property of the United States, which were destroyed by the contractor. This is in accordance with paragraph 4 of Article III of the contract dated January 1, 1918. The amount due on this item has been determined by the Ordnance Claims Board to be \$10,074.95.

5. For the reasons stated, therefore, the Appeal Section hereby affirms the award of the Ordnance Claims Board rendered on this claim on February 16, 1920, and the relief prayed for on appeal is hereby denied.

SUMMARY.

1. The contractor is indebted to the United States in the sum of \$41,143.88, being the balance due on advanced payments made by the War Credits Board. There is also due accrued interest on the above sum.

2. The contractor is also indebted to the United States in the sum of \$10,074.95 for shells and other components, the property of the United States destroyed by the contractor.

3. The sum of \$4,182.45 hereby awarded the contractor as the balance due on the heat treating plant should be deducted from the amount due from the contractor to the United States, as the amount the contractor owes the United States exceeds the amount which the United States owes the contractor.

4. If the 5 per cent retained by the disbursing officer has not been paid to the contractor, the amount properly due thereon should also be deducted from the amount the contractor owes the United States.

DISPOSITION.

A copy of this decision together with the entire file in this case will be transmitted to the Ordnance Section, War Department Claims Board, for appropriate action in accordance herewith.

Lieut. Col. McKeeby and Capt. Woodfin concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

JUNE 11, 1921.

Case No. 3071.

In re CLAIM OF OSTERLIND PRINTING PRESS & MANUFACTURING CO.

This claim was referred to Appeal Section by action of standing committee, War Department Claims Board.

Capt. Frazer writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim arises under the act of March 2, 1919. Statement of claim, Form A, has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, 1919, for \$103,917.99, by reason of an agreement alleged to have been entered into between claimant and the United States.

2. On the 13th day of September, 1918, the United States Government had a contract with the Twin City Forge & Foundry Co., located at Stillwater, Minn., for the manufacture of munitions. This company had a plant adjoining certain premises known as the Old Prison Buildings. The Twin City Forge & Foundry Co. in order to perform its contract purchased the so-called Old Prison Buildings from the city of Stillwater, subject to certain existing leases thereon.

3. The Osterlind Printing Press & Manufacturing Co. was one of the lessees and occupied a large portion of the premises. The Twin City Forge & Foundry Co. went into possession of a large portion of the premises not occupied by the Osterlind Printing Press & Manufacturing Co. The space occupied by the Twin City Forge & Foundry Co. proved not to be adequate for the Government work they were doing.

4. The Ordnance district chief, Mr. E. A. Russell, came to Stillwater, Minn., on behalf of the War Department to further the work of the Twin City Forge & Foundry Co. upon its contract. On the 13th day of September, 1918, the following letter was addressed to the Osterlind Printing Press & Manufacturing Co. from the Ordnance district chief:

"OFFICE OF ORDNANCE DISTRICT CHIEF, CHICAGO, ILLINOIS.

Stillwater, Minn., September 13, 1918.

From: Ordnance District Chief.

To: Osterlind Printing Press & Mfg. Co.

Subject: Vacation of buildings necessary for manufacture of Ordnance material.

1. In order that the Twin City Forge & Foundry Co., may successfully carry out the obligations of their contract with the U. S. Gov-

ernment, it has become necessary that you vacate immediately Section, A, B, C, D, E and F, as designated in the lease which you hold for this space in the Old State Prison Buildings, situated in the city of Stillwater, Minn.

2. An immediate compliance is requested.

Respectfully,

E. A. RUSSELL,
Ordnance District Chief."

5. On September 14, 1918, the following letter was received by Mr. E. A. Russell, Ordnance District Chief, Chicago, Ill.:

"STILLWATER, MINN., *September 14, 1918.*

Mr. E. A. RUSSELL,
Ordnance District Chief, Chicago, Ill.

DEAR SIR:

Your communication, dated September 13, at Stillwater, Minn., signed by you, has been duly received and we have already started to comply with your request of moving out of the buildings that we occupy under lease executed by the city of Stillwater and transferred to the Twin City Forge & Foundry Company of our city.

Respectfully,

OSTERLIND PRINTING PRESS & MFG. CO.
By CARL BERGLUND,
General Manager & Treasurer."

6. At or about the time Mr. E. A. Russell issued the above order he had conferences with representatives of the Osterlind Printing Press & Manufacturing Co., in which he stated that it was necessary for the Osterlind Printing Press & Manufacturing Co. to vacate the premises in order that the United States might secure the necessary production of munitions. That Mr. E. A. Russell instructed the Osterlind Printing Press & Manufacturing Co. to keep a record of any losses or damages that it might incur on account of giving up the property and that these claims would be taken care of by the Government.

7. The Osterlind Printing Press & Manufacturing Co. in compliance with the order and instructions, and after assurances from the Government, did vacate the premises, and the record discloses that the Osterlind Printing Press & Manufacturing Co., as a result of the compliance with the order and instructions issued by E. A. Russell, suffered a loss in the amount of \$14,401.32.

DECISION.

1. It is the opinion of this Board that an implied agreement within the meaning of the act of March 2, 1919, arose between the Government and the claimant as a result of the orders, instructions, and assurances given by the Ordnance district chief, an official acting under the authority, direction, and instruction of the Secretary of War, and the compliance therewith by the claimant.

DISPOSITION.

Certificate Form C will be made up and a document setting forth the nature, terms, and conditions of the agreement and the same, together with a copy of this decision, will be transmitted to the Ordnance Section of the War Department Claims Board for action in the manner provided in subdivision C, section 5, Supply Circular 17, Purchase, Storage, & Traffic Division.

Lieut. Col. McKeeby and Capt. Montfort concurring for the Appeal Section; Col. Morrow concurring for the War Department Claims Board.

JULY 9, 1921.

Case No. 3069.

In re CLAIMS OF LAWRENCE F. CASHMAN, TRUSTEE IN BANKRUPTCY
FOR THE BELL MANUFACTURING CO.

ON APPEAL BEFORE THE SECRETARY OF WAR.

For statement of facts and decision of Appeal Section in above case, see Volume
VIII, page 848.

Upon consideration of the record and appeal in the above-entitled case, the action of the Appeal Section, War Department Claims Board, is affirmed.

JOHN W. WEEKS,
Secretary of War.

JULY 18, 1921.

Case No. 2664.

(See Vol. VIII, p. 294.)

A claim having been presented under the act of March 2, 1919, commonly called the Dent Act, by Messrs. George A. Carden and Anderson T. Herd, based upon an agreement under which the United States acquired title to seven ships:

Now, by virtue of the authority in me vested by said act, I do hereby award to the said Carden & Herd, in full adjustment, payment, and discharge of said claim, exclusive of prospective profits, the sum of five hundred fifty thousand dollars (\$550,000.00), and I hereby find and declare that no subcontractors are interested in said claim;

And I hereby direct that the sum of five hundred fifty thousand dollars (\$550,000.00), awarded as aforesaid, be paid to the said Carden and Herd out of the unexpended balance of any appropriation available for that purpose.

JOHN W. WEEKS,
Secretary of War.

Accepted at Washington, D. C., July 18, 1921.

GEORGE A. CARDEN.
ANDERSON T. HERD.

AUGUST 26, 1921.

Case No. 3061.

In re CLAIM OF THE REO MOTOR CAR CO.

ON APPEAL BEFORE THE SECRETARY OF WAR.

(See Vol. VIII, these decisions, p. 823.)

Upon consideration of the appeal and record in the foregoing case, I approve of the recommendations of the vice chairman of the War Department Claims Board in his memorandum of July 29, 1921, with the exception of the item of coal, which I believe should be allowed, and the item of unabsorbed overhead due to delay in receiving plans, which, I believe, should be allowed in the sum of \$73,548.72.

Further proceedings will, therefore, be had in accordance with these orders.

J. M. WAINWRIGHT,
Acting Secretary of War.

JULY 29, 1921.

Case No. 3061.

In re **CLAIM OF THE REO MOTOR CAR CO.**

ON APPEAL BEFORE THE SECRETARY OF WAR.

Re: (Tractors.)

MEMORANDUM FOR THE SECRETARY OF WAR.

This claim arises under a formal, cost-plus, fixed-profit contract, and comes before the Secretary of War on appeal from a decision of the Appeal Section, War Department Claims Board, dated April 27, 1921, in which partial relief was granted. Written briefs have been filed and oral argument has been submitted in substantiation of claimant's contentions.

This claim was originally presented to the Detroit District Ordnance Office and was, in the due course of administration, forwarded to the Ordnance Section, with certain recommendations of the supervising cost accountant of the Detroit District Office attached. The recommendations of the cost accountant in some instances approved items claimed, in others there were modifications suggested, while some of the items appearing in claimant's petition were disallowed. The Ordnance Section, after having received some testimony in support of the claimant's position, allowed certain of the items and disallowed others. Claimant being dissatisfied with the findings of the Ordnance Section, perfected its appeal to the Appeal Section of the War Department Claims Board, which Board, after reviewing the entire record, by its decision of April 27, 1921, followed and affirmed the findings of the Ordnance Section in relation to some of the items presented and reversed the Ordnance Section in others. The findings and decisions of the various Boards and Sections passing on this claim will be more fully set out in the body of this memorandum under the various items as they appear in the order presented.

The record, though voluminous, contains very little actual affirmative evidence, which would be valuable in determining the several questions here presented. The absence of such evidence, which would really be of benefit to both the claimant and the Government, renders

proper consideration of the case extremely difficult to me, as I would much prefer to have facts than to deal with assumptions.

There are approximately 13 items in dispute, and which are now submitted to you on appeal. The case is not one arising under the act of March 2, 1919 (Dent Act), but is one growing out of a formally signed contract, under the terms of which the rights of the parties are to be determined and under which your decision is subject to review by the accounting officers of the Treasury. Instead of virtually one lawsuit to determine, there are, therefore, presented in this vague and unsatisfactory way approximately 13 suits grouped into one.

Before proceeding to discuss in detail the various items presented, I believe the fundamental difficulty in this case was caused by the belief on both sides at the time of signing of the contract that the contractor had adequate facilities for the performance of the contract. Even before they started into production, claimant and the Government officers discovered that they did not have adequate facilities for quantity production of the articles covered in the contract, and additional machine tools for use of the Government work were purchased. They were purchased with the full knowledge, if not at the urging, of the Government officials. But the contract itself did not cover increased facilities. These purchases continued monthly, until approximately \$250,000 had been so expended for machine tools. Shortly after the armistice they brought the question to the Contract Officer, Ordnance Department, who in construing clause 6, article 5, of the contract which reads—

“The cost of all patterns, dies, tools, jigs, fixtures, etc., * * *” held that the word “tools” as set out above included *machine tools*.

The cost accountant for the Detroit District Ordnance Board declined to accept or follow this construction of clause 6, article 5, of the contract and refused to voucher this item. The Ordnance Section in its findings sustained the attitude of the cost accountant.

It is perfectly obvious that claimant in his desire to cover this expenditure for machine tools has maintained and urged under one guise or another its claim for this item of expense, which in reality is one for increased facilities, and which were not thought necessary or contemplated by either the parties at the time of the execution of the formal contract.

The War Department Claims Board, in construing other contracts in which clauses identical with clause 6, article 5, of this contract appear, has uniformly followed the rule that wherever the word “tools” appears in the contract it means small expendable tools and not machine tools.

Claimant has contended before the Appeal Section, and at the hearing before the Assistant Secretary of War, and by brief sub-

mitted, that where anything is in dispute between a contractor and the United States the matter will be submitted first to the contracting officer for decision; that he has full authority to decide all questions submitted; that the contractor can then receive payment for those items on which favorable decision has been made by that officer, and then appeal to the Chief of Ordnance on those items decided adversely to him; that there he can repeat the process of accepting items allowed and appealing to the Secretary of War on those in which his contentions were not favorably considered.

In other words, claimant's theory is that it is proper for the Secretary of War or his subordinate officer, by virtue of a contract in writing, to clothe a contracting officer with final and absolute authority to decide that money shall be paid out of the United States Treasury, removing this power entirely from the jurisdiction of the Comptroller of the Treasury and also rendering it impossible for a claimant to apply to the Court of Claims for relief from a decision which the contracting officer and his superiors might make on a question either of law or fact, no matter how illegal or erroneous his decision might be. Personally, I do not believe that such a doctrine finds support either in law or in conscience.

I can not conceive how it could possibly be legal or proper for the Secretary of War to approve a contract which would, on the one hand, divest the accounting officer of the Treasury of his authority, or, on the other, prevent the review of adverse and improper decisions of executive officers by the Court of Claims. To subscribe to such a doctrine would be tantamount to an attempt upon the part of one department of the Executive branch of the Government to divest or circumscribe the powers of another.

The clause in the contract upon which this doctrine is predicated is, in my judgment, inserted in order that any works of public importance, or any contracts upon which the safety of the Nation depends should not cease or be delayed by disputes, arising during performance, between the contractor and the representatives of the Government. It would seem that the effect of this clause would be to render the decision of the contracting officer final on the incidental dispute and that the contractor should, after such decision, go ahead with the work, but without prejudice to his rights of review and revision by higher authority. Certainly it was never intended that such a clause would vest in an inferior an authority so great that his actions would not be subject to review by the superior.

To express it in another way, the claimant says (reversing the well-known doctrine of the military establishment, that the power of a subordinate is ipso facto vested in his superior) that the superior, in this case the Secretary of War, to whom the funds were origi-

nally given by Congress, can only act when appealed to by the contractor, and can only supervise, modify, or set aside the action of his subordinates by the grace of the appeal of the contractor. To best illustrate the fallacy of this doctrine, one needs only to consider the everyday procedure and practice as followed by the courts. For example, "A" brings his action at law against "B," setting up 10 counts or causes of action. The court renders a judgment in favor of "A" on seven of the counts and in favor of "B" on the remaining three. "A," being dissatisfied with the judgment, perfects his appeal to the appellate court. Upon the hearing of the case on appeal, the higher court will consider the record in its entirety and will render its judgment upon the whole 10 counts.

The situation presented in the case under consideration is analogous to the foregoing illustration and must be determined accordingly.

It may also be said, in passing, that there is an extreme necessity for the entire record, together with the findings and decisions of the various boards which have previously passed on it, to be reviewed.

I doubt if any body of men or any individual will, on this record, agree with any other body or individual as to what items should be allowed or as to what items should be disapproved.

While this claim has been in the War Department Claims Board there has been the sharpest disagreement between the best men I have under me as to what should or should not be done, and the last action of the Standing Committee on this matter was predicated upon the thought that it was more essential, without further delay, to get a concrete case before the accounting officer of the Treasury than it was to prolong the discussion in order to arrive at a perfect decision.

After mature consideration, the recommendation of the Standing Committee was that the entire case be settled on the lines of the decision of the Appeal Section and that the matter be transmitted without delay to the accounting officer of the Treasury for appropriate action. This would have been done at once, following the decision of April 27, 1921, had not the claimant appealed to you.

Item 1. Accelerated or normal depreciation, \$40,751.00.—This item was originally presented in the sum of \$56,477.89. It has been rejected by the accountants, by the Ordnance Section, and by the Appeal Section of the War Department Claims Board. The ordinary depreciation which the company wrote off its books has been allocated and allowed in proportion to the amount of direct labor, which is the usual method of estimating the amount of depreciation allowable under any contract. It is to be conceded that there was, in the rush of war work, a certain amount of abnormal or accelerated

depreciation, but the evidence in this record on this point is far from convincing. Furthermore, all the depreciation which the company has written off its book has already been accounted for and paid. The contention of the claimant is that it suffered a larger percentage of depreciation by reason of its Government war contracts than it did from its commercial operations for the same period and, therefore, the United States should bear the greater burden. However, the direct labor of this company on Government work was about 44 per cent, and the direct labor applied to commercial work for the same period was about 56 per cent. Instead of the claimant bearing its proper proportion of the depreciation, without evidence, it argues and contends that the United States should bear about 68 per cent of the depreciation because of war work, while it should assume because of its commercial activities only 32 per cent. In the absence of any proof or any persuasive reason why the United States should bear any more than the ordinary and just proportion of the plant depreciation, I believe the decisions heretofore rendered by the Ordnance and Appeal Sections denying this item to be correct.

Item 2. Claim for reimbursement for 2,632.85 tons of coal at \$4.84 per ton plus a handling charge of 50 per cent per ton; total amount claimed, \$14,059.43.—This item was denied by supervising cost accountants of the Detroit District Ordnance Office, allowed by the Ordnance Section, and approved by the Appeal Section. Personally, I am not in agreement with either the Ordnance or Appeal Sections as to this item. It will be remembered that during the severe winter of 1917-18, with the entire breakdown of transportation, that this country, for the first time, learned of heatless days. It was discovered that the average manufacturer or large user of coal in this country lived, so to speak, from hand to mouth; that his storage facilities were inadequate; and that he was not accustomed to making seasonable laying in of adequate reserve supplies of fuel. Profiting by the serious results of that severe winter, the Fuel Administrator urged upon all large users of both coal and oil, as a matter of their own protection as well as in the interest of the public, the wisdom and necessity of laying in a reserve supply of fuel during the summer months. Prompted by these urgings, claimant purchased some Indiana coal. That it was not as good in quality as he had been in the habit of using in his factory may be admitted. Due to the armistice, in November, and the mild winter of 1918, the country was not again called upon to go through the almost catastrophe of the previous year. The fact that the various manufacturers of the country had laid in a supply of coal at the suggestion of the Fuel Administrator did not make the United States an insurer of the coal and fuel oil purchased.

The fact that manufacturers followed the advice of the Fuel Administrator and stored up an adequate reserve supply of fuel was the best insurance obtainable by the manufacturers against loss which might have been occasioned by long shutdowns, owing to the deranged fuel transportation facilities of the country. It was a precaution which redounded exclusively to their benefit. The most conclusive fact which militates against the allowance of this item is the well-established doctrine that the United States, as a business man or as a contractor, is not responsible for the acts of the United States as a lawgiver (first Court of Claims decision). The Fuel Administrator, in directing the fuel affairs of the country during a period of national crisis, derived his authority from the act of Congress known as the Lever Act, and any action which he may have taken in the premises was within the spirit and in furtherance of the mandate of Congress, the law-making department of our Government.

Aside from the foregoing reasons, it is most pertinent to urge that this coal was not exclusively for Government work but was also for use in its commercial operations. An attempt to charge the entire item to the United States, even under the very questionable color of right, is without foundation under the terms and provisions of the contract, and finds no support in either law or equity. I therefore recommend that the allowance of this item be disapproved.

Item 3. Interest on money borrowed for contract, \$36,629.47.—This item was allowed in full by the Ordnance Section but was denied by the Appeal Section. The decision of the Appeal Section was based on the express provisions of the contract, which makes it requisite to the contractor's right to reimbursement for items of this character that it shall be conclusively shown that the interest for which reimbursement is sought was paid on money actually borrowed for the specific purpose of purchasing materials necessary to carry on the contract. The evidence submitted by the claimant discloses that the various sums of interest making the total here claimed were paid by claimant for renewals of notes originally negotiated during commercial activities and prior to the execution of the contract now under consideration. There is much to be said for the technical position taken by the Appeal Section; there is much, also, to be said for the position here taken by the claimant. Large amounts of material were purchased by claimant for its contract and its funds, in large amount, were tied up for periods before reimbursement was made by the United States. To carry on this work, claimant had to secure money from outside sources, upon which it necessarily had to pay interest. While technically the money used by claimant for the purpose of this contract was obtained by the renewal of notes already made, thereby conserving the actual cash flowing into its treasury,

yet, at the same time, this item of interest represents the claimant a direct out-of-pocket expense. I am of the opinion that if it were possible to enter into the computation of carrying each item of the material purchased and the money that was actually borrowed or used until the expenditures were reimbursed by the United States that the amount stated by the Ordnance Section would be greater than the sum here charged. I therefore recommend that the decision of the Appeal Section disapproving this item be vacated and the item, as allowed by Ordnance Section, be reinstated and allowed.

Item 4. Cost of tools not accounted for, \$17,574.77.—No item in the whole claim has been more acrimoniously discussed than this. Notwithstanding that twice the claimant company has had its opportunity to present such proof as it might desire to both the Ordnance and the Appeal Sections, it has not done so, and the nature of the tools and the manner in which their loss was occasioned is still surrounded by a veil of mystery. The only light thrown upon this item by the claimant is by an affidavit which sets up conclusions but contains few facts. This item was allowed by the Ordnance Section but was denied by the Appeal Section. The total amount expended for tools paid by the Government on this contract is approximately \$155,000. In many contracts which have been adjusted by the War Department Claims Board the wastage or dissipation of tools has been estimated and settled on the basis of 5 per cent of the total amount purchased. In this case, without affirmative proof, a demand is made upon the United States to pay for an unaccounted wastage or loss of tools at the rate of approximately 12 per cent of the total amount. I can not concur with the claimant in the use of the term "willful negligence." Unless he accepts, the same as other contractors, the sum of 5 per cent of the total amount expended as dissipation, I recommend that the item be disallowed.

Item 5. Expenditure for arranging testing field, \$577.54.—This item was allowed by both the Ordnance and the Appeal Sections. It appears that it was necessary that the articles manufactured under this contract should be subjected to tests under various conditions involving their use in heavy sand and deep mud. That this necessary new condition should be met, claimant provided a testing field adjacent to its factory. The sand was placed upon the field and a water system installed in order that mud of various depths and conditions would be available. While this item is not specifically provided for under the terms of the contract and was, in all human probability, not contemplated by either the Government or claimant, yet the installation of a testing field was a service of an essential nature.

This is an item of cost capable of being set up in the exact figures as to the cost incurred and is of such a nature as to distinctly come

within the provisions of that part of article 5 of the contract reading as follows:

"In addition thereto, further allowances of cost from time to time have been made by contracting officer. * * * Such additions to the allowance of cost and such regulations and instructions in regard to its determination as from time to time shall be adopted by the Chief of Ordnance."

This item has been allowed by the Ordnance and Appeal Sections. I concur with their findings and for the foregoing reasons, as stated, recommend payment.

Item 6. Office and factory equipment, \$655.44.—Allowed by cost accountant, Ordnance and Appeal Sections. I concur.

Item 7. Fencing.—Allowed by cost accountant, Ordnance and Appeal Sections. I am of the opinion that this item is allowable under the provisions of article 5 of the contract. I therefore concur and recommend payment.

Item 8. Storage on Government equipment, \$39,297.45.—The Appeal Section did not agree with either the cost accountant or the Detroit District Ordnance Office, the Ordnance Section, or the claimant relative to this item inasmuch as each one has laid special stress upon one or another of the various provisions of the contract. I am of the opinion that the decision of the Appeal Section is correct and that the claimant should be paid a reasonable rental which may be agreed upon and which, in no event, is to exceed 10 per cent per annum on the cost to the claimant of such lands and buildings so used. It is in the evidence that the total cost of the truck plant was \$188,656.89, the total area being 218,583 square feet. The Ordnance Section finds that 3 cents per square foot was a reasonable rental but this fixation of square-foot rental would make the monthly rental on the building \$6,557.49, or almost four times the amount of rental at the rate of 10 per cent, which the contract expressly limits to storage charges. The action of the Appeal Section in sending this item back to the Ordnance Section for further computation, I believe to be correct. I therefore recommend that decision and recommendations of the Appeal Section be affirmed.

Item 9. Interest on machine tools and costs, \$23,072.98.—Disallowed by all and not seriously contended for by claimant. There is no legal ground whatsoever for such a claim. Further discussion of this item is deemed unnecessary. It is recommended that the disallowance of this item by the cost accountant, Ordnance and Appeal Sections, be affirmed.

Item 10. Special accounting services, \$22,808.74.—This item was disallowed by the Ordnance and Appeal Sections on the grounds that the employment was not such as was contemplated by article 5 of the contract and was a service for the exclusive benefit of claimant

in the preparation of its claims and accounts. There is no evidence of record which justifies any other conclusion. I therefore recommend that the disallowance of this item by the cost accountant, Ordnance and Appeal Sections, be affirmed.

Item 11. Balance of profit due under contract, \$272,389.44.—As is stated in the body of the decision of the Appeal Section, this item is presented by claimant upon the theory that certain sums which may be the subject of an allowance under the contract are items upon which the company will be entitled to 10 per cent profit allowed under article 5 and the termination clause (art. 9). Your attention is invited to the following: Had the contract gone to completion, the claimant would have been entitled to only a fixed profit per unit, which would have amounted to \$825,000. The contract having been terminated while only two-thirds complete, and the termination clause providing that in case of termination the profit should be calculated on the basis of 10 per cent of the total cost allowable under article 5. The contractor has submitted a statement showing the actual costs, the 10 per cent profit thereon, and payments received on account of such profits, which leaves an unpaid profit, under the termination clause of the contract, in the sum of \$272,389.44. The statement submitted by contractor in substantiation of this item, and which appears in the file, has not been certified to or verified in any way by a qualified Government accountant, as is required under the provisions of the contract. That the statement filed by the claimant should be checked over and verified by a representative of the Government is deemed most necessary in order that it be definitely determined that the statement does not include items of expenditure upon which a 10 per cent profit is not allowable. The importance of this verification is illustrated by the following comparison: (a) The contractor claims on a two-thirds complete contract on the basis of cost-plus 10 per cent a profit of \$800,579.34; (b) on the completed contract, whereby the Government would have received 1,000 more tractors, or all of the tractors contracted for, the contractor's maximum profit would have been \$825,000. It is interesting to note that if the claim as is here presented is allowed in its entirety, claimant will receive on the two-thirds suspended contract \$863,894.00, or \$38,894.00 more than it would have received had the contract gone to completion.

In order to determine the correct profit allowable on the basis of expenditures, there will have to be added to this sum the profit allowable on those claim items approved for payment under this appeal as come within the provisions of article 5 of the contract.

This office can not agree to a construction of the entire contract which would permit a greater profit to the contractor for the per-

formance of a portion of the work than is given by complete performance.

The record is silent as to why the Government has not audited this item, I presume, because it was not presented originally to the cost accountants at Detroit. It has apparently been left by both the Ordnance and Appeal Sections as mainly a matter of arithmetic to be computed after the other matters are settled. When it is seen, however, that it includes examination of vouchers totaling \$9,000,000 the magnitude of the work that should be done is apparent.

No matter whether this item is ultimately disposed of by the accounting officers of the Treasury or the Court of Claims, an audit on the part of the Government will be necessary and will delay the final solution of this case. I therefore recommend that you direct an audit of these items based on the provisions of article 5.

Item 12. Unabsorbed overhead and administrative expenses due to delay in receiving plans, \$118,994.61.—The contention of the claimant is that under the terms of the contract the plans and specifications were to be furnished by the Government by December 31, 1917. There were great delays in furnishing the drawings, and deliveries under the contract were subsequently postponed four months on account of these delays. Due to the nonreceipt of the drawings and specifications, uncertainty was caused to the contractor as to his productive program. Where this uncertainty and delay enters into a business program financial loss results, but the determination of the amount in a large commercial plant, where the ordinary commercial business is being conducted at the same time, meets so many factors that the exact amount can not be mathematically determined. Claimant under the various theories and at various times has demanded various amounts, running as high as \$327,000. The supervising cost accountant at Detroit after considerable study recommends the award of \$73,548.72. The Ordnance Claims Board recommends \$65,230.25. The Appeal Section set up a modified theory, on which the computations have not yet been made. Looking at the express terms of the contract it would seem that the Government did not obligate itself to furnish the drawings by December 31. The contract was signed on December 11. It was at that time known to both parties that only tentative plans were then in existence, and with conditions as they were it was practically impossible to have a complete set of working plans, drawings, and specifications built in 20 days. So far as the record shows, the Government furnished the drawings within a reasonable time, everything considered, and then complied with the terms of the contract by extending the delivery dates in accordance with the delays in furnishing of specifications. The record is full of various comparisons which, to me, are not very illuminating. The most sensible and logical figures in the record are those by Mr. Davis,

arriving at his conclusion that the demonstrated cost for all the delay amounted to \$73,548.72. The picture drawn in claimant's brief, on page 34, of the enormous truck plant of the contractor being *immediately* turned over to the Government for the purpose of this contract, machines being rearranged, and the entire department working at top speed tuning up is not supported by the evidence and is contrary to experience and what would be expected of capable men at the head of the Reo Motor Co.

Furthermore, this contract has been assumed by most people that dealt with it as a cost-plus fixed profit, but it might be more accurately described as a *limited cost-plus* fixed profit, as article 5 of the contract, instead of saying "all costs," expressly enumerates the elements that enter into the cost of the contract, for which the Government was to reimburse the contractor. Violence must be done to the language of article 5 if an item such as this is to be included within its terms. Various theories and allowances in one sense are really all set up on the theory of breach of contract, and yet in one sense the contract was not binding on the contractor until the specifications had been delivered. In my judgment, if you stay strictly within the four walls of the contract, the item here claimed for is not allowable.

Item 13. Unabsorbed Overhead and Administrative Expense Following Termination, \$320,212.78.—This item was rejected by both the Ordnance and Appeal Sections, first, on the ground that it is not within article 9 of the contract; secondly, because the evidence is too vague and unsatisfactory. The theory of claimant is that *it would have made this amount of money had it not had the Government contract rather than that it is a direct expense incident to the contract.* The only authority for the allowance of an item of this character would be under the provisions of War Department Circular 111, which provides that, under certain conditions, a rehabilitation charge is allowable. However, Supply Circular 111 is not applicable here for the reason that the contract now under consideration contains a termination clause which prescribes the method and manner of settlement in event of suspension before entire completion. Under the decisions of the War Department Claims Board (Templar Motors Co. and Gas Oil Chemical Co.) the provisions of War Department Circular 111 may only be invoked in the settlement of suspended contracts under two conditions: First, where the contract itself contains no termination clause, and second, where the contract does contain a termination clause, but where settlement more favorable to the United States can be obtained through the medium of the provisions of this circular. At all events, the claimant is not entitled to the benefit of both the termination clause in the present con-

tract and the provisions of Circular No. 111. Claimant is strenuously insisting that his rights are those expressly given to him in the contract, nothing more and nothing less, and if this settlement is to be based on the termination clause, this item is not allowable.

Item 14. Cost of machine tools, approximately \$255,000.—This is the item which has caused the greatest amount of difficulty in the case. As it was presented, the Contracting Officer made a decision favorable to the claimant on the construction of the contract that was unsound. In my judgment, the decision of the Appeal Section, which did not follow the Contracting Officer's decision, is likewise unsound, as they virtually set up by argument and not by evidence, that there was a parol modification and addition to the contract by which the Government agreed to pay for increased facilities. They then further proceed to hold that the words "at best prices obtainable" in article 2 makes the Government responsible for increased facilities. In this, in my judgment, they likewise do violence to the facts. These words are necessary even if it is held that increased facilities not contemplated by the contractor at the time of the execution of the contract but which are subsequently installed would enter into the determination of cost on account of depreciation of such facilities, and for that reason the United States has a right to require of the contractor that he secure these things, even under this contract, at the best prices obtainable if the pro rata cost is to be chargeable to the United States as an item of cost.

The Ordnance Section disallowed the item as claimed, but proposed an item of \$20,949.84 for the depreciation on the machine tools in controversy not absorbed by the completed portion of the contract. In my judgment, the Ordnance Department made a proper disposition of this item under the terms of the contract. On the whole record, I am constrained to recommend to you that you disapprove the action of the Appeal Section and approve the action of the Ordnance Section as to this item.

RECAPITULATION.

Accelerated or abnormal depreciation, \$40,751.00. Disallowed.

2,632.85 tons of coal at \$4.84 per ton, plus handling charge of 50 cents per ton, \$13,380.44. Disallowed.

Interest on money borrowed for contract, \$36,629.47. Allowed.

Cost of tools not accounted for, \$17,574.77. Disallowed. (Recommendation for allowance of 5 per cent on total amount expended.)

Expenditures for arranging testing field, \$577.54. Allowed.

Office and factory equipment, \$655.44. Allowed.

Fencing, \$1,275.52. Allowed.

Storage on Government equipment, \$39,297.45. Recommended this item be sent to Ordnance for further computation.

Interest on machine tool costs, \$23,072.98. Disallowed.

Special accounting service, \$22,808.74. Disallowed. Verification by Government accountant recommended.

Unabsorbed overhead and administrative expenses, due to delay in receipt of plans, \$118,994.61. Disallowed.

Unabsorbed overhead and administrative expenses following termination, \$320,212.78. Disallowed.

Cost of machine tools, \$255,000. Disallowed, with recommendation that \$20,949.84 be allowed for depreciation.

In conclusion, I must repeat that the lack of evidence in the record makes this an exceedingly difficult case to consider. Claimant has had two opportunities to present evidence, and in the absence of proof the Secretary of War is not justified in authorizing large expenditures of Government money.

Respectfully,

J. A. HULL,
Vice Chairman, War Dept. Claims Board.

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Authorization by an engineering representative and contracting agent under a formal cost-plus contract to pay labor at a rate higher than that which the contract states shall not be exceeded is without authority and not binding upon the United States. (Duesenberg Motor Corporation, Case No. 3024, VIII these Dec., 161.)

Where a representative of the United States Railroad Administration, at the request of a bureau of the War Department, places an order for material for the War Department, such representative of the United States Railroad Administration becomes an agent of the War Department. (Norfolk & Southern Railroad Co., Case No. 3033, VIII these Dec., 210.)

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Amortization means extinction of debt, usually by a sinking fund, while depreciation is to be considered as an element of expense allowable on the property owned and used by the contractor in connection with the manufacture of the articles contracted for. (Winchester Repeating Arms Co., Case No. 3037, VIII these Dec., 679.)

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Where a prospective contractor makes expenditures before an informal agreement is entered into, such expenditures can not be reimbursed, as they were not made upon the faith of the agreement subsequently entered into. (Bahamas Agricultural & Trading Co. (Ltd.), Case No. 3068, VIII these Dec., 811.)

Where a prospective contractor made expenditures for facilities for the purpose of performing a contract which it expected to get, but which was never signed, such expenditures were not made upon the faith of any agreement with the United States. In absence of a provision in the contract providing for the amortization of special facilities, it must be presumed that the contractor was equipped with the facilities necessary to enable it to perform the contract, and if expenditures are made for facilities and the contract is suspended before completion, the contractor is not entitled to reimbursement for such expenditures. Held, there was no agreement and claimant is not entitled to any reimbursement. (Chapman Price Steel Co., Case No. 2876, VIII these Dec., 78.)

A manufacturer is not entitled to reimbursement for the expense of installing special facilities even with the knowledge and consent of officers of the Ordnance Section in the absence of an agreement, express or implied, that the Government will reimburse claimant for such expenses. (Winchester Repeating Arms Co., Case No. 2989, VIII these Dec., 91.)

Where claimant without direction from some Government agent increases its facilities upon the assumption that it will receive future orders, it does so at its own risk and the Government is not obligated to reimburse it for such expenditures. (Wood Art Machine Co., Case No. 2999, VIII these Dec., 163.)

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A claim based on the alleged "constructive commandeering" of the contractor's plant by officers of the Ordnance Department is not sustained by proof that the contractor agreed to and acquiesced in substantially every act which claimant has alleged amounted to said "constructive commandeering" of its plant by Ordnance officers. (Lawrence F. Cashman, Trustee in Bankruptcy for Bell Manufacturing Co., Case No. 3069, VIII these Dec., 848.)

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Where the formal contract is executed after the suspension of a verbal agreement, and solely for the purpose of enabling the contractor to present a claim against the United States, such a formal contract is void for want of consideration. (Bahama Agricultural & Trading Co. (Ltd.), Case No. 3068, VIII these Dec., 811.)

Where six copies of a written contract were executed by claimant and returned to the Ordnance Department and the same were lost and never found and duplicate copies of the original contract are executed by both parties after the armistice, the execution of the copies of the original contract is void for want of consideration, as it was an attempt to create an obligation against the United States where none existed. (U. S. Cartridge Co., Cases No. 3048, 3049, 3050, 3051, 3052, VIII these Dec., 613.)

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Under the act of March 2, 1919, a contractor can not be reimbursed for expenses incurred in preparing and prosecuting a claim. (Atlas Powder Co., Case No. 3067, VIII these Dec., 778.)

When an informal contract has been suspended by the Government the contractor is entitled to an allowance for loss on rent of plant for a reasonable time while the contractor is endeavoring, without success, to obtain work. (Austern, C., & Co., Case No. 2305, VIII these Dec., 443.)

Claimant is entitled to reimbursement for reasonable expenditures necessarily incurred upon the faith of a verbal agreement under the act of March 2, 1919. (Bahama Agricultural & Trading Co. (Ltd.), Case No. 3068, VIII these Dec., 811.)

CONTRACTS—Continued.**CONTRACTS, ADJUSTMENT—Continued.**

Where a contractor enters into an agreement for personal services extending over a period of more than 12 months, such an agreement is within the Statute of Frauds. If the contractor pays the employee the difference in salary between what the employee would have earned during the term of employment and what he did earn after he was discharged, such an expenditure was not necessary and can not be reimbursed under the act of March 2, 1919. (Bahama Agricultural & Trading Co. (Ltd.), Case No. 3068, VIII these Dec., 811.)

Where a contract providing a fixed profit and a bonus on articles completed and accepted by the Government is suspended when two-thirds of the articles have been delivered to and accepted by the Government and the Government later accepts the balance of the articles in an uncompleted state, the contractor is entitled to the profit and bonus on the cost of all articles accepted by the Government. (Breese Aircraft Co. (Inc.), Case No. 2456, VIII these Dec., 419.)

Where the evidence shows that a cost-plus contract is entered into based on estimated cost furnished by the contractor and investigation afterwards proves said cost exorbitant, this Board will refuse to recommend any further or additional payment to claimant. (Burke & James (Inc.), Case No. 3060, VIII these Dec., 523.)

Where the evidence establishes the fact that the claimant had a cost-plus contract providing for the payment to it of the cost of the articles contracted for plus fixed profit of \$173 each, and, in addition thereto, a certain percentage of all savings over and above the estimated cost price, and that claimant has been paid the cost of all cameras plus the unit profit of \$173 each, and that the estimated price was either grossly erroneous or fraudulently stated, this Board will refuse to recommend any further or additional payment to the claimant and will leave it to pursue any remedy it may have in the Court of Claims, where such matters are properly cognizable. (Burke & James (Inc.), Case No. 3060, VIII these Dec., 523.)

Where the Government Valuation Committee fixed a certain value on claimant's wool, the valuation so fixed will be deemed the true value of such wool, for the purpose of adjusting claimant's contract, in the absence of evidence showing such value to have been erroneously fixed. (Alex Ferguson, Case No. 3025, VIII these Dec., 278.)

Where a contractor allocates to a proxy-signed contract sufficient material to perform said contract and later finds it necessary to use some of the material allocated to the proxy-signed contract in order to complete the performance of a purchase order, and thereafter purchases more material and allocates a portion of this latter purchase to the proxy-signed contract, the contractor is entitled to the loss incurred on account of the purchase of the raw material so allocated to the proxy-signed contract. (French Manufacturing Co., Case No. 1148, VIII these Dec., 360.)

A contractor is entitled to losses arising in connection with the purchase of raw material allocated to a Government purchase order issued claimant after the date of claimant's purchase of the raw material if said purchase order comes within the exceptions of section 3744, Revised Statutes. (French Manufacturing Co., Case No. 2523, VIII these Dec., 345.)

CONTRACTS—Continued.**CONTRACTS, ADJUSTMENT—Continued.**

Where a contract, formally executed within the meaning of Revised Statutes, 3744, contains a clause which provides a method or basis of settlement to be resorted to in event the contract is terminated or suspended by the United States prior to full performance and the contract is in fact suspended by the United States upon the grounds of public policy (the necessity of the thing to be furnished under the contract having ceased to exist), such settlement, if any, to which the contractor may be entitled shall be made according to the terms of the termination clause of the contract unless it shall appear that a more favorable settlement to the United States may be effected under the various supply circulars of the War Department. (Jacob Goldman, receiver for Gas Oil Chemical Co., Case No. 1970, VIII these Dec., 629.)

Claim under the act of March 2, 1919, for \$34,212.35. An agreement is found whereby claimant is entitled to payment for the cost of erecting a building for instruction purposes, for services of instructors and stenographers, for supplies and equipment furnished upon request of certain officers, and for payment of rent of a house used as the headquarters office, all in connection with a school established for the training of officers and enlisted men in the maintenance of motor equipment at claimant's Peoria plant. Claimant is not entitled to reimbursement of expenses in moving and altering houses for rental as quarters to officers. (See Vol. VIII, p. 412.) (Holt Manufacturing Co., Case No. 3035, VIII these Dec., 535.)

Where the United States takes possession of claimant's plant under the act of August 10, 1917, and claimant is obliged to acquire a new building and make permanent improvements thereon which enhance the value of the building, and also temporary improvements which could only be used by an occupant of the building engaged in the same business (roasting coffee and tea), and said temporary improvements are dismantled after the United States returns claimant's plant to it, claimant is entitled to be reimbursed the cost of expenditures made for such temporary improvements, less the salvage thereon. (Jewel Tea Co., Case No. 3066, VIII these Dec., 782.)

Where the United States takes over claimant's plant, as recited in paragraph 1 above, and claimant is therefore obliged to handle its incoming green coffee and tea several more times than he would have handled it had its plant not been requisitioned, and is obliged to ship a part of the green coffee and tea to Chicago which would have been roasted in its plant before being shipped, and incurs other expenses which would not have been incurred if its plant had not been requisitioned, claimant is entitled to reimbursement for the extra loss and expense so incurred. (Jewel Tea Co., Case No. 3066, VIII these Dec., 782.)

Where a formal purchase order for a 500-ton barge which contains a termination clause is terminated, the measure of damages is the difference between the contract price and the fair market value of the barge at the time the purchase order was terminated. (J. E. Lyons, Case No. 3015, VIII these Dec., 540.)

Where United States troops take possession of private property, and during the occupancy of same damage and destruction is occasioned by the troops, the owner of the property is entitled to reimburse-

CONTRACTS—Continued.**CONTRACTS, ADJUSTMENT—Continued.**

ment for the amount of the actual damages sustained. (Maryland State Fair (Inc.), Case No. 3038, VIII these Dec., 547.)

In estimating the measure of damages in such circumstances as stated in paragraph 1 a safe rule to follow, as prescribed in G. O. 39, W. D., 1918, and G. O. 37, W. D., 1920, is to determine the cost of restoration of the premises and deduct therefrom a certain sum as representing the excess value of the restored property over the value of the property which was damaged or destroyed. (Maryland State Fair (Inc.), Case No. 3038, VIII these Dec., 547.)

As to increased cost of manufacture due to change in method there can be no recovery. (2) As to increased cost in manufacture due to change in specifications relief is granted. (3) The award of the Ordnance Section for damages due to suspension of the contract is reasonable and will not be disturbed. (Mesta Machine Co., Case No. 3006, VIII these Dec., 151.)

Where a contract for machining shell is suspended when about one-third complete, the cost of machinery used on a previous contract can not be amortized, but the expense of reinstallation and of the necessary repairs and equipment to fit the machinery for use on the Government contract may be amortized where both the Government and claimant contemplated that such expense would be necessary. (Platt Iron Works, Case No. 2914, VIII these Dec., 482.)

The expense of normal current repairs due to use of machinery in machining shell under a contract which is afterwards suspended should be absorbed in the price received for the finished shell, and no allowance can be made therefor. (Platt Iron Works, Case No. 2914, VIII these Dec., 482.)

Where by reason of the suspension of a contract the contractor's opportunity to reclaim spoiled forgings is cut off, as is also his opportunity to recoup his loss on spoiled forgings in the early stages of the contract in excess of normal spoilage, the contractor is entitled to such an allowance on account of spoiled forgings as will reasonably compensate him for such excessive spoilage as he would have recouped had he been permitted to finish the contract. (Platt Iron Works, Case No. 2914, VIII these Dec., 482.)

Although the percentage of overhead to direct labor charged by a contractor whose contract is suspended may appear high, yet if the expense so charged was actually and in good faith incurred in connection with the contract, and there is no evidence of negligent mismanagement, the percentage charged should be allowed in an offer of award under a suspended contract. (Platt Iron Works, Case No. 2914, VIII these Dec., 482.)

If, due to war conditions, the cost of a necessary special facility in the nature of a permanent addition to the contractor's plant is abnormally high, the Government should reimburse claimant for the unamortized portion of such excess cost upon suspension of the contract. (Platt Iron Works, Case No. 2914, VIII these Dec., 482.)

Where the usual source of supply for gauges was exhausted, and a contractor makes necessary gauges in its shop and thereby incurs experimental expense not reflected on view of the gauges not consumed on suspension of the contract, it is more equitable to amortize the actual cost of all gauges prepared and necessary for the contract

CONTRACTS—Continued.**CONTRACTS, ADJUSTMENT—Continued.**

over the entire contract than to estimate the cost of the gauges on hand and allow the estimated cost of the unused ones and one-half the estimated cost of those used but not consumed. (Platt Iron Works, Case No. 2914, VIII these Dec., 482.)

Where the contract provides for an increase in the price of shell if engineering changes increase the cost, and the cost of the shell is increased because of changes in the forgings specifications, on suspension of the contract the contractor is entitled to an allowance sufficient to cover such excess cost, including the cost of additional equipment. (Platt Iron Works, Case No. 2914, VIII these Dec., 482.)

The unamortized portion of the premium paid a surety company for a bond given the War Credits Board as security for a loan of funds with which to purchase materials is an element of cost incident to the contract, and on suspension of the contract the contractor should be relieved thereof, where the necessity for such loan was contemplated at the time the contract was executed. (Platt Iron Works, Case No. 2914, VIII these Dec., 482.)

Where on suspension of a contract and before the finance forms are available the contractor sets up his claim on a cost-plus basis and afterwards is required to set it up on finance forms the additional expense thus incurred is not an item of cost for which the contractor can be reimbursed. (Platt Iron Works, Case No. 2914, VIII these Dec., 482.)

Where a contractor whose contract is suspended includes in his claim an item for the cost of materials in process and a claim for excess cost of finished shell, and in an amended claim separates the excess cost into items caused by engineering changes and excess early cost, improperly including the cost of materials in process in the early excess cost, the error is immaterial, and if the item of early excess cost in the sum claimed is reasonable it is proper to include in an award to be offered on suspension of the contract an additional allowance for the cost of unworked direct materials. (Platt Iron Works, Case No. 2914, VIII these Dec., 482.)

In order to provide for shrinkage on materials taken from a contractor's storeroom for use on a contract for machining shell, a percentage determined from extended experience may be allowed as an item of cost of a suspended contract where, pursuant to the contractor's custom, such percentage is necessary to show the true cost of such materials. (Platt Iron Works, Case No. 2914, VIII these Dec., 482.)

Where in order to avoid an increase in wages a contractor in good faith pays small bonuses to workmen, such bonuses may be allowed as a part of the labor cost in making an award under a suspended contract.—(Platt Iron Works, Case No. 2914, VIII these Dec., 482.)

The Government under the provisions of a formal contract undertook to furnish complete drawings by December 31, 1917. The said drawings were not supplied to the contractor until several months thereafter, thereby causing the contractor additional expense under the contract. The Government is responsible for and the contractor is entitled to reimbursement of the actual cost and expense to which he has been subjected. (Reo Motor Car Co., Case No. 3061, VIII these Dec., 823.)

CONTRACTS—Continued.**CONTRACTS, ADJUSTMENT—Continued.**

This is a claim under General Order 103 to adjust a dispute under the terms of the contract with the Surplus Property Division. Claimant was awarded 37,811 yards of duck khaki, 30-inch, at a total price of \$15,270.43, as a result of an advertisement and its proposal. Claimant paid the required deposit of 10 per cent on \$1,517.04. Claimant received a sample of the goods and on inquiry was informed that one edge was raw selvage, a fact not mentioned in the advertisement or letter accepting its bid. Claimant then ordered 1,000 yards, paying the full price. Claimant was advised that an allowance of 10 per cent would be made if satisfactory to it. Claimant requested the return of its deposit and 10 per cent rebate on the 1,000 yards taken. Following the decision of the Secretary of War on appeal in the Aeronautical Equipment Co. (Inc.), Sale B. C. A. 17, it is held that claimant is entitled to a cancellation of the contract as to the balance of the yardage and return of its 10 per cent deposit. (J. Richman & Co., Case No. 3039, VIII these Dec., 281.)

In accordance with the provisions of Supply Circular No. 111 and No. 126, 1918, no profit can be allowed on direct material furnished by subcontractors. (Van Dorn Iron Works, Case No. 3028, VIII these Dec., 284.)

Prorating overhead cost between the contractor's commercial work and Government work on the labor-hour basis places an excess burden of overhead cost on the commercial work, which is unfair to the contractor when production on Government work has been greatly delayed by the failure of the Government to furnish drawings, parts, etc., on time. The proper basis of prorating the overhead for the period of delay is the basis that obtained when the contractor finally got into production on Government work. (Van Dorn Iron Works Co., Case No. 3028, VIII these Dec. 284.)

Where claimant executes a final award, Form 1, which purports to be in final settlement of a certain contract, without knowing the full purport of the award and without intending thereby to release another claim then pending on the same contract, and said award is approved by the Ordnance Claims Board and the War Department Claims Board and signed by representatives of said boards without knowing that claimant had another claim pending on the same contract, there was a mutual mistake in making and executing said award. Also if the final award is not just and fair there has not been that payment, adjustment, and discharge of the agreement upon a fair and equitable basis which the act of March 2, 1919, requires the Secretary of War to make. An award made under such circumstances should be vacated and another award made upon a fair and equitable basis. (U. S. Cartridge Co., Cases No. 3048-3052, VIII these Dec., 613.)

Where claimant enters into several cost-plus contracts with the United States for the manufacture of rifles and munitions and the plant and plant facilities used in the manufacture of same were previously constructed and installed for the performance of contracts which claimant had with foreign Governments, claimant is not entitled to have the expenditures made in installing said plant and facilities amortized over its contracts with the United States. (Winchester Repeating Arms Co., Case No. 3037, VIII these Dec., 679.)

CONTRACTS—Continued.**CONTRACTS, ADJUSTMENT—Continued.**

Nor will such expenditures made as set out in paragraph 1 be treated as an element of cost under the "Definition of Cost" pamphlet issued by the Ordnance Department June 27, 1917. (Winchester Repeating Arms Co., Case No. 3037, VIII these Dec., 679.)

CONTRACTS, ANTICIPATION.

A contractor can not be allowed for losses incurred in connection with commitments made prior to the date of an informal agreement under the act of March 2, 1919, since such commitments could not have been made on the faith of the agreement. (C. Austern & Co., Case No. 2305, VIII these Dec., 443.)

Where claimant, without direction from some Government agent, increases its facilities upon the assumption that it will receive future orders, it does so at its own risk, and the Government is not obligated to reimburse it such expenditures. (C. Austern & Co., Case No. 2857, VIII these Dec., 127.)

Statement made by a procurement officer to a contractor that the United States Government was badly in need of raincoats and that claimant would be given contracts does not create any agreement, expressed or implied, that authorizes the Secretary of War to pay to claimant any expenditures made by it in equipping a factory for the purpose of making raincoats, especially in view of the fact that claimant was at the time engaged in the manufacture of raincoats for the Government and after the equipment of the factory received additional contracts. (Newark Rubber Co., Case No. 3059, VIII these Dec., 589.)

CONTRACTS ASSIGNMENT OF.

Where a person in his individual capacity enters into a contract for supplying a prime contractor on a Government project with certain sand and gravel and thereafter assigns the said contract to a corporation such assignment precludes the payment of any money by the United States to claimant or his assignee, as such assignment is prohibited by the provisions of section 3737, Revised Statutes. (Fitzgerald Construction Co., Case No. 3043, VIII these Dec., 349.)

CONTRACTS, BREACH.

Where the Government notifies a contractor that a contract must be canceled claimant may refuse to accept the Government's notice as a breach and may consider the contract as still in existence. (Compac Tent Co., Case No. 3018, VIII these Dec., 258.)

Where claimant submits a bid to a prime contractor having charge of the construction, specifying a certain date on which deliveries are to begin, which deliveries are necessary for the proper construction of the Government project, and claimant fails to begin delivery on the date specified in the proposal, the prime contractor is justified in canceling the said order, and no agreement, express or implied, is thereby created whereby the United States Government is in any wise bound to reimburse claimant for expenditures made in an effort to place itself in position to make deliveries within the time stated in its proposal to the prime contractor. (Fitzgerald Construction Co., Case No. 3043, VIII these Dec., 349.)

The failure of claimant to furnish a performance bond as required by a formal contract constituted such a breach of the contract as authorized the United States to terminate the contract by cancella-

CONTRACTS—Continued.**CONTRACTS, BREACH—Continued.**

tion. (West Coast Shipbuilding Co., Case No. 2296, VIII these Dec., 470.)

CONTRACTS, CANCELLATION.**CONTRACTS, COMPLETED.**

See JURISDICTION.

CONTRACTS, CONSIDERATION.**CONTRACTS, CONSTRUCTION.**

Where claimant had a proxy-signed contract providing for the delivery by it to the Government of certain articles therein called for upon a cost-plus basis, which said informal contract was later amended and supplemented by two formal contracts, the last of which reduced the number of articles to be delivered from 4,000,000 to 2,500,000 and provided that the payment to claimant of \$8.50 for each of the 2,500,000 shells "shall be accepted by the said contractor in full satisfaction of any and all claims arising out of the said original contract as hereby amended," same is a settlement contract and release, and upon payment of the same any claim the contractor might have had against the Government is fully satisfied and released. (American Can Co., Case No. 2919, VIII these Dec., 567.)

Where an informal proxy-signed contract is subsequently amended by two formally executed so-called supplemental contracts which strike out of the said informal contract certain portions thereof relating to the method of payment and the furnishing of materials and providing that the articles contracted for shall be paid for on a unit-price basis instead of a cost-plus basis, the informal contract is merged in the subsequently executed formal supplements. (American Can Co., Case No. 2919, VIII these Dec., 567.)

Unless especially provided in the contract, or the necessity thereof contemplated at the time the contract was made and their cost included in the contractor's estimate of cost, there can be no recovery for the cost of special or increased facilities. (American Propeller & Manufacturing Co., Case No. 3054, these Dec., 743.)

Where claimant has a contract to dye and waterproof certain airplane hangars at the rate of 30 per day, but only treats 9 to 10 per day, and cars shipped by the Government to claimant containing hangars accumulate on the sidetrack, and claimant is thereby compelled to pay demurrage on same, the said demurrage can not be recovered from the Government as the accumulation of cars was caused by claimant's failure to comply with the terms of its contract. (Baker & Lockwood Manufacturing Co., Case No. 3022, VIII these Dec., 195.)

Where a supplemental agreement with the contractor provided for the erection of a heat-treating plant which was to be paid for by, and become the property of, the United States, the estimated cost of which was placed at \$12,000, but the actual cost of which was in excess of \$16,000, the contractor is entitled to reimbursement to the extent of the actual cost of said heat-treating plant. (Lawrence F. Cashman, Trustee in Bankruptcy for Bell Manufacturing Co., Case No. 3069, VIII these Dec., 848.)

In a formal contract containing a provision that "Nothing herein contained shall be deemed to impose any obligation on the part of the United States to guarantee the delivery of any specific quantity of garbage" there is no obligation on the part of the United States to

CONTRACTS—Continued.**CONTRACTS, CONSTRUCTION—Continued.**

maintain any troops at the camp referred to in said contract during the period covered by the contract. (Wm. J. Cocke, Case No. 8020, VIII these Dec., 101.)

Where formal contract provides for liquidated damages for delay in delivery of the articles contracted for, but provides that delays due to "labor strikes in the works on the contractor" are to be considered as due to unavoidable causes, and a strike occurs in a plant of the subcontractor, the prime contractor can not take advantage of such strike as an excuse for failure to deliver the article contracted for on time. Held, claimant not entitled to remission of the liquidated damages which were deducted from the contract price. (Dale Machinery Co., Case No. 3040, VIII these Dec., 529.)

Where a purchase order for work on thread gauges provides for the replacement of rejected gauges at contractor's expense, and claimant immediately enters an objection to this provision, but accepts the order by commencing performance of same after an interview with a Government official, who informs claimant that this provision can not be eliminated, the terms of the purchase order will be strictly followed in determining a settlement with claimant after suspension. (Goddard Tool Co., Case No. 3045, VIII these Dec., 558.)

Where a claimant has a formally executed contract to construct certain roads which are shown on the general authorization for road construction at a United States Army cantonment, and while so engaged upon the construction work is directed by the camp constructing quartermaster to build an emergency road, or one not contemplated under the original contract, and where the contractor complies with the instructions of the camp quartermaster and completes the emergency roadway, and later, because the funds appropriated to the work under the contract having become exhausted, two of the authorized road projects are abandoned, the emergency roadway will be considered as having been substituted in lieu of the abandoned authorized road projects, and the contractor is not entitled to receive a fee under these conditions greater than that stipulated in his formal contract. (Harry F. Hann, Case No. 3007, VIII these Dec., 601.)

Where claimant sells wool to the Government in 1918 under regulations issued by the War Industries Board for the clip of 1918, which regulations provide that the wool shall be taken over by the Government at certain prices, depending upon its quality and condition, there is no agreement, express or implied, whereby the Government is obligated to pay to the claimant any sums other than as set out in the said regulations. (Hart Wool Co., Case No. 3016, VIII these Dec., 272.)

When the claimant had a contract to ten Government-owned sheepskins and a price to be paid thereunder was fixed on an understanding that there was to be no delivery until required by the Government and that they might be stored for a reasonable time, the expense of storage and insurance to be borne by claimant even to the extent of storing the articles in a public warehouse if so requested by the Government, it was the duty of the claimant to hold the articles until delivery was ordered and there arose no liability

CONTRACTS—Continued.**CONTRACTS, CONSTRUCTION—Continued.**

on the Government to pay storage or insurance costs until a reasonable time after claimant had notified the Government and requested removal. (A. C. Lawrence Leather Co., Case No. 1933, VIII these Dec., 142.)

Where a constructing quartermaster instructs a railroad company to furnish material and labor for certain additions and betterments in accordance with a previous informal written understanding that the company would be reimbursed for expenses incurred in said work, and the company thereafter constructs additions and betterments, the Government is obligated under the act of March 2, 1919, to pay claimant for such additions and betterments constructed on the Government reservations. (Louisiana Railway & Navigation Co., Case No. 2859, VIII these Dec., 166.)

Where the written contract incorporates Schedule A which specifies the physical properties of the foregoing to be produced, but is silent as to the method to be employed to obtain those physical properties, and the contract also contains a provision for reimbursing the contractor for any increase in cost of manufacture due to changes in the specifications, and the contractor is forced to employ a more expensive method in manufacture than was contemplated at the time the contract was negotiated, such increase in cost of manufacture does not come within the provision of the contract relating to changes in specifications. (Mesta Machine Co., Case No. 3006, VIII these Dec., 151.)

Where the written contract contains a provision for reimbursing the contractor for any increase in cost of manufacture due to change in specifications, and changes are made in specifications which increase the cost of manufacture, the contractor is entitled to reimbursement for such increased cost. (Mesta Machine Co., Case No. 3006, VIII these Dec., 151.)

Where the written contract contained a termination clause which permits the contractor to purchase, at a reduced price to be agreed upon, facilities furnished by the Government, and the bureau board makes an award in the nature of a rebate on the price to be paid for such facilities, as damages sustained by reason of the termination of the contract, such an award will not be disturbed in the absence of evidence that it is unfair. (Mesta Machine Co., Case No. 3006, VIII these Dec., 151.)

Where the claimant's contract provides for delivery of hay f. o. b. at a certain point and claimant delivers the hay there, the title to such hay thereupon passes to the Government, and the Government is liable to claimant for the contract price of the article so delivered. (Albert Miller & Co., Case No. 3019, VIII these Dec., 188.)

Where a formal contract has a clause providing that the same can be terminated if the public interest shall require, and in that event the contractor shall be paid 10 per cent of the amount of materials, etc., on hand not in the course of manufacture, and has a further clause providing that in case of such termination the contractor be in default, upon the statement in writing of the contracting officer that the contractor has in good faith used his best efforts in the performance of the contract he shall be paid a compensation of not more than 10 and not less than 5 per cent of the amount of such

CONTRACTS—Continued.**CONTRACTS, CONSTRUCTION—Continued.**

materials, and the evidence shows the contractor to be in default it is a condition precedent that before any payment can be made to the contractor upon such termination of the contract that the contracting officer shall certify in writing that the contractor has used its best efforts to perform the contract in accordance with the terms thereof. (N. Y. Air Brake Co., Case No. 3026, VIII these Dec., 662.)

Where no such statement in writing has been made by the contracting officer, but the district ordnance claims board and the Ordnance Section, War Department Claims Board, have stated in their opinion that the contractor has used his best efforts in the performance of his contract, upon appeal to this board by the claimant, the same is a repudiation of the decision of the district ordnance claims board and the Ordnance Section, War Department Claims Board, and the claim comes before this board de novo and without any expression of opinion from anyone that the contractor has used his best efforts in the performance of the contract, and this board is within its rights in saying that in its opinion the contractor has not used its best efforts in the performance of the contract. (N. Y. Air Brake Co., Case No. 3026, VIII these Dec., 662.)

Where a formal contract has a clause providing that the contractor shall be paid in accordance with certain provisions thereinbefore set out in case the continued performance of the contract "is prevented by acts of war, riots, or incendiarism, or other causes beyond the control and without the fault of the contract which may be directly traceable to the war now existing between the United States and Germany," and the said performance is not prevented by acts of war, riots, or incendiarism, the said clause must be construed to mean acts analogous to acts of war, riots, or incendiarism and does not include the delays claimant suffered by inability to secure prompt delivery of material or supplies or to secure an adequate force of labor. (N. Y. Air Brake Co., Case No. 3026, VIII these Dec., 662.)

Where the enumerated excuses for the nonperformance within the time limit of the contract are acts of war, riots, and incendiarism and is then followed by the general phrase "other causes beyond the control and without the fault of the contractor which may be directly traceable to the war now existing between the United States and Germany," and none of the enumerated excuses of war, riots, or incendiarism happen, but claimant was delayed by his inability to promptly get materials, labor, etc., the general causes following the enumerated causes can not be extended to the extent necessary to include the alleged failure to secure materials, supplies, etc., promptly. If the general phraseology could cover all the causes in fact beyond the contractor's control it would cover the expressly enumerated causes and their inclusion in the contract would be ineffective and meaningless, and it can not be presumed that the specific provisions would have been stated if they were covered by the general provisions, and the entire paragraph must be so construed as to allow each portion thereof to have its full and adequate effect. The doctrine of "ejusdem generis" (of the same nature) is applicable to this case and the words following the enumerated words must be construed to include only causes that were of the same nature as war, riots, or incendiarism and can not include the other delays com-

CONTRACTS—Continued.**CONTRACTS, CONSTRUCTION—Continued.**

plained of by the contractor. This rule is clearly stated in the case of *Mich. v. Russell* (136 Ill. 22, 26 N. E. 528): "By application of the maxim 'ejusdem generis' (of the same nature) general and specific words which are capable of an analogous meaning, being associated together, take color from each other, so that the general words are restricted to a sense analogous to the less general." (N. Y. Air Brake Co., Case No. 3026, VIII these Dec., 662.)

Where a contract provides that the cost of increased facilities of articles for which the United States shall pay shall be in accordance with Ordnance Department pamphlet "Definition of Cost Pertaining to Contracts," dated June 27, 1917, which is attached to and made a part thereof, which pamphlet under paragraph 47 provides only for the payment of interest on investment or bonded debts and for money borrowed to finance the purchase of materials necessary to complete the contract, no interest can be paid claimant on various balances due it by the United States even though claimant is correct in its allegation that it expended its own money for the purchase of materials for the United States Government and thereafter borrowed money to take its place. The contract, being a formal contract, must be strictly construed and this Board can not go outside of its plain provisions. (N. Y. Air Brake Co., Case No. 3026, VIII these Dec., 662.)

Where a railroad company at the request of the Government constructs a siding adjoining a chemical plant operated by the Government, the Government is obligated to reimburse the railroad company for the cost of the construction and removal of that portion of the siding on the railroad right of way from the clearance point to the outer boundary of the right of way in addition to that portion of the siding beyond the right of way. (New York Central Railroad Co., Walker D. Hines, Director General of Railroads, Case No. 2606, VIII these Dec., 177.)

Interest paid and to be paid on a loan from the War Credits Board for the purchase of material for use in connection with the contract for the machining of shell is an element of cost, and on suspension of the contract the contractor should be relieved thereof, where the Ordnance Pamphlet entitled "Definition of Costs Pertaining to Contracts," dated June 27, 1917, is a part of the contract. (Platt Iron Works, Case No. 2914, VIII these Dec., 482.)

Where a formal cost-plus-fixed-profit contract provides that the contractor shall supply "at the most reasonable prices obtainable * * * such plant, machinery, tools, and other facilities * * * and the like, as may be necessary to enable * * * all the requirements of this contract * * * to be complied with in manner satisfactory to the contracting officer," and the contractor purchases additional machine tools for the performance of said contract upon the urgent insistence of officers of the Government, the contractor is entitled to proper reimbursement for the cost of said machine tools under the contract. (Reo Motor Car Co., Case No. 3061, VIII these Dec., 823.)

Where a cost-plus-fixed-profit contract, after designating certain specific items of cost, in each instance exhausting the class, provides in a blanket clause that "further allowances of cost from time to

CONTRACTS—Continued.**CONTRACTS, CONSTRUCTION—Continued.**

time may be made by the contracting officer," the "items of cost" contemplated in that clause are not limited to items analogous to those set forth theretofore, but include any cost necessary to the performance of the contract. In this case this Board finds that the attitude and acts of Government officers constitute an allowance so far as the purchase of additional machine tools is concerned. (Reo Motor Car Co., Case No. 3061, VIII these Dec., 823.)

A formal contract must be construed in accordance with the clear meaning of the written instrument. Therefore, where the said contract makes no provisions for payment by the Government of the cost of plant rearrangement, either before or after the performance of the contract, the contractor is not entitled to recover from the Government any portion of these costs. (Reo Motor Car Co., Case No. 3061, VIII these Dec., 823.)

Where abandonment of work done by the Government was discussed between the subcontractor and the constructing quartermaster prior to the execution of the subcontract relative to what schedule of percentages should be allowed in case the work was abandoned, and the subcontract is silent as to abandonment of the work, all prior discussions and negotiations are merged into the signed contract which expresses the meeting of the minds of the parties. (Snare & Triest Co., Case No. 3047, VIII these Dec., 463.)

Where the claimant and the Government have entered into a formal supplemental settlement contract, for a specific sum to be paid upon the performance of certain acts by both claimant and the Government and the said acts have been performed by both parties, the Government is bound by the terms of the contract as executed in same manner as an individual. (Sutton Chemical Co., Case No. 3041, VIII these Dec., 382.)

Where there is no evidence of fraud or mistake the provisions of the contract govern, and the Government can not withhold part payment of the agreed settlement by reason of the arising of certain contingencies that might have been foreseen but were not provided for in the settlement contract, the said contingencies having later presented themselves and the Government paying for the same, as they were not provided for in the instrument at the time of execution. (Sutton Chemical Co., Case No. 3041, VIII these Dec., 382.)

In the absence of duress, fraud, or mistake of fact prior oral negotiations are merged in the subsequent written instrument signed by the parties, and it makes no difference that the instrument was proxy-signed on the part of the United States. (Western Cartridge Co., Case No. 3055, VIII these Dec., 460.)

Where a claimant enters into several cost-plus contracts with the United States for the manufacture of rifles and munitions and the plant and plant facilities used in the manufacture of same were previously constructed and installed for the performance of contracts which claimant had with foreign Governments, claimant is not entitled to have the expenditures made in installing said plant and facilities amortized over its contracts with the United States. (Winchester Repeating Arms Co., Case No. 3037, VIII these Dec., 679.)

CONTRACTS—Continued.**CONTRACTS, FORMAL.**

Where no expenditures have been made or no obligations incurred upon the faith of a formal contract, relief will be denied. The Secretary of War has not authorized the bureau boards to adjust claims based on formally executed contracts or informal contracts except where expenditures have been made or obligations have been incurred upon the faith of the same. (Commercial Bank of Spanish America (Ltd.), Case No. 3034, VIII these Dec., 655.)

Where a formal cost-plus contract providing, among other things, for increased facilities is later amended by an informal supplemental contract increasing the amounts that can be spent for special facilities, and is in turn again amended by a formal supplemental contract providing for greater additional increased facilities, the first informal supplemental contract is merged in the second formal supplemental contract, and the contracts before this Board for construction are therefore formal contracts and the act of March 2, 1919, can not be applied to the settlement of the same. (New York Air Brake Co., Case No. 3026, VIII these Dec., 662.)

CONTRACTS, IMPLIED.

Where in transactions between the Government and claimant it had been customary for the Wood Chemical Section of the War Industries Board to cause to be shipped to claimant acetate of lime and thereafter to issue orders to claimant for the manufacture of methyl acetate from said lime and required claimant to purchase and pay for the acetate of lime and hold the same subject to further orders by the Wood Chemical Section of the War Industries Board, and after the receipt of the lime by claimant and after it had paid therefor claimant receives no further orders for methyl acetate, there is an implied agreement on the part of the Government within the meaning of the act of March 2, 1919, to reimburse claimant for the cost of the acetate of lime and to otherwise save claimant harmless from any loss on account of the transaction. (Alcohol Products Co., Case No. 194, VIII these Dec., 114.)

Where claimant is authorized by an officer of Ordnance Department to make experimental castings of nickel steel, for purpose of having chemical tests made, and in course of the work expenses are incurred which were incidental and necessary, and where, in order to conserve excess metal, it became necessary to pour such metal into smaller molds, and where the Government takes possession of such smaller castings, there is an implied agreement on the part of the Government to reimburse claimant such expenses, and to pay for the small castings at the fair market value thereof at the time they were taken. (Baltimore Trust Co. & C. C. Pusey, receivers of the Hess Steel Co., Case No. 3009, VIII these Dec., 180.)

Where Government officers authorized a privately owned automobile to be used in the Government service, and the automobile was so used, there is an implied agreement created whereby the United States is obligated to reimburse the owner thereof for such amount which the owner has necessarily expended in the upkeep of the automobile for that period of time it was so used. (R. Boyd Burleigh, Case No. 3046, VIII these Dec., 414.)

CONTRACTS—Continued.**CONTRACTS, IMPLIED—Continued.**

Where during the past emergency, and while the railroads were under the control of the United States Government, machinery was shipped to the claimant company and the railroad failed to deliver within time for it to comply with its contract with the prime contractor for the delivery of sand and gravel by July 1, 1918, no implied agreement thereby results that the Secretary of War is authorized to adjust or settle under the provisions of the Dent Act. As the Railroad Administration operating the railroads was a separate and distinct organization the Secretary of War is in no wise responsible for its acts of commission or omission and has no authority to adjust or settle any damages resulting from its failure to make proper deliveries. (Fitzgerald Construction Co., Case No. 3043, VIII these Dec., 349.)

An implied agreement does not arise under the act of March 2, 1919, from the requests of Government officials for the contractor to increase production. (Goddard Tool Co., Case No. 3045, VIII these Dec., 558.)

Where Government officer requests certain repair work to be done on Government property and the repairs are done an implied agreement arises obligating the United States to reimburse claimant the actual cost and expenses of labor and materials furnished in making the repairs. (Pennsylvania Railroad Co., case No. 3010, VIII these Dec., 335.)

Where Government officer requests that workmen's train service be extended from station on the main line of a railroad to Government proving grounds for the benefit of Government employees, and in accordance with such request the train service is so extended over the tracks of the proving grounds, an implied agreement arises obligating the United States to reimburse the fair and reasonable value of such service for the period of time the service was rendered. (Pennsylvania Railroad Co., Case No. 3010, VIII these Dec., 335.)

Where claimant was engaged in the production of plane tables and its contract was about to expire, and it applied to the Government for a new contract and was advised that same would come through shortly, and during the conversation claimant was told not to discharge its force but to keep the same intact, and to proceed to get the necessary material and supplies for continued production, an agreement was thereby entered into between the claimant and the Government whereby the Government is obligated to pay to claimant the reasonable expenditures made in complying with such request. (Pfau Manufacturing Co., Case No. 1779, VIII these Dec., 213.)

Where claimant was told by a contracting or negotiating officer that a contract for additional plane tables was coming through and claimant thereupon made commitments with certain compass manufacturers, there is an agreement whereby the United States is obligated to pay claimant for such reasonable commitments as were made on the faith of the said agreement. (Pfau Manufacturing Co., Case No. 1779, VIII these Dec., 213.)

An implied agreement under the act of March 2, 1919, does not arise from assistance given a contractor by the War Department in securing a loan from the War Finance Corporation even though it

CONTRACTS—Continued.**CONTRACTS, IMPLIED—Continued.**

appears that the loan would not have been made had not the War Department urged the War Finance Corporation to assist the contractor. (Rollin Chemical Co., Case No. 2911, VIII these Dec., 129.)

CONTRACTS, INFORMAL.

Where a contractor at the request of an officer of the Ordnance Production Department purchases additional machinery to expedite production on a contract which has been delayed by failure of the Ordnance Department to make deliveries of forgings on time, and is promised that the United States will reimburse it for such expenditures, such facts constitute an informal agreement within the purview of the act of March 2, 1919. (Carlson-Wenstrom Co., Case No. 2511, VIII these Dec., 185.)

CONTRACTS, ORAL.

Where claimant entered into written negotiation with duly authorized Government officer in the shape of proposals, which proposals were duly accepted, and the claimant proceeded to perform the work and afterwards entered into a so-called formal contract subsequent to the complete performance of the work, this Board will hold the said formal contract invalid and claimant is entitled to reimbursement in accordance with the former proposals and acceptances exchanged between claimant and the Government officer prior to the performance of the work. (James Shewan & Sons Inc., Case No. 3017, VIII these Dec., 436.)

CONTRACTS, PREPARATION.**CONTRACTS, PROMISE.****CONTRACTS, PROXY-SIGNED.****CONTRACTS, RECOMMENDATION.****CONTRACTS, RE-FORMATION.**

The Secretary of War can only re-form contracts on the ground of mistake under such circumstances as would justify a court of equity in re-forming a contract, and the evidence must be clear and positive and establish by a preponderance of the same the existence of the mistake alleged. (American Can Co., Case No. 2919, VIII these Dec., 567.)

Where claimant entered into a termination contract with the Government on account of any claim or commitment under the said contract, the same is final and can not be reopened by this board or re-formed except in the case of fraud or gross mistake, and the same is binding upon the claimant and it is precluded from setting up any further commitments under the said contract. (Baker & Lockwood Manufacturing Co., Case No. 3022, VIII these Dec., 195.)

The Secretary of War can only re-form contracts on the ground of mistakes under such circumstances as would justify a court of equity in re-forming a contract. (Kalbfleisch Corp., Case No. 3044, VIII these Dec., 450.)

In order to justify the re-formation of a contract on the grounds of mutual mistakes the testimony must be clear and cogent and must establish a mutual mistake of a fact having a present or past existence and must show that at the time of the execution of the contract the parties intended to say a certain thing and by mistake expressed another. (Kalbfleisch Corp., Case No. 3044, VIII these Dec., 450.)

CONTRACTS—(Continued.**CONTRACTS, RE-FORMATION—Continued.**

Where a formal contract is entered into that attempts to embody a prior informal agreement and the said contract is signed long after the work contemplated in the said informal agreement has been completed, the said formal contract so entered into is null and void and this board has no power to re-form the said formally executed contract. (James Shewan & Sons (Inc.), Case No. 3017, VIII these Dec., 436.)

Where claimant's representative is verbally told by officers of the Legal Section and of the Procurement Division of the Ordnance Department that written contracts with his company would contain a labor-disputes clause similar to that contained in "Instructions to bidders," and the labor-disputes clause is omitted from the written contracts by mutual mistake, and its omission is not discovered by the contractor until after execution of the contracts, the written contracts do not express the intention of the parties. The written contracts which were proxy signed will be re-formed so as to incorporate therein the labor-disputes clause. As to the formal contracts which did not contain the labor-disputes clause, the Secretary of War has no jurisdiction to grant relief. However, claimant is not precluded from petitioning the Auditor for the War Department and the Comptroller of the Treasury for a re-formation of the formal contracts. (U. S. Cartridge Co., Cases No. 3048-3052, VIII these Dec., 613.)

CONTRACTS, RESCISSION.**CONTRACTS, SETTLEMENT.****CONTRACTS, SUSPENSION.****CONTRACTS, TERMINATION.****CONTRACTS, WHAT CONSTITUTES.**

Where a contract provides for the delivery of unassembled spare parts for airplanes, and the contractor is thereafter directed by an agent of the Secretary of War to assemble these parts, the Government is obligated under the act of March 2, 1919, to pay the contractor for the assembling of the spare parts. (American Steel & Wire Co., Case No. 1672, VIII these Dec., 519.)

A statement made by a War Department official to a contractor to the effect that the contractor would be recommended for an award of a contract does not constitute an informal agreement under the act of March 2, 1919. (C. Austern & Co., Case No. 2305, VIII these Dec., 443.)

Where a prospective contractor refused to sign the formal contract until changes had been made in certain material terms thereof, and such changes were never made, and the contract was never signed, there was no meeting of the minds, and no informal agreement was entered into between claimant and the United States. (Chapman Price Steel Co., Case No. 2876, VIII these Dec., 78.)

A Quartermaster Corps purchase order for \$32,405.62, dated June 20, 1917, providing for the manufacture and delivery of tent flies on or before November 7, 1917, constitutes an informal agreement under the act of March 2, 1919. (Compac Tent Co., Case No. 3018, VIII these Dec., 258.)

CONTRACTS—Continued.**CONTRACTS, WHAT CONSTITUTES—Continued.**

Where the Director of Purchase, Storage and Traffic issues a compulsory order to claimant whereby the entire output of ketone produced in its factory is commandeered for the use of the Government at a price fixed by the Secretary of War, such order constitutes an agreement within the meaning of the act of March 2, 1919, obligating the Government to take the commandeered product at the fixed price and the title to such product vested in the United States at the time of its production. (E. I. Du Pont de Nemours Co., Case No. 3014, VIII these Dec., 104.)

Where an officer enters into a verbal agreement prior to November 11, 1918, with claimant, and claimant upon the faith of such agreement furnishes labor and material, it is entitled to payment therefor. (Fletcher Savings & Trust Co., receivers of The Stenotype Co., Case No. 3057, VIII these Dec., 611.)

When a contractor while operating under Government contracts acquires material in excess of requirements for those existing contracts, partly in expectation of future contracts and partly because of contractor's voluntary change in the use of materials, the Government, in the absence of a specific agreement, is not bound to reimburse loss caused thereby. Mere urgings and requests by Government agents upon manufacturer to keep a sufficient supply of raw material on hand so as to keep in continuous production and be able to take future orders so long as the production is needed by the Government, without specifying the amount of the material, price, or duration of the need of such production, such urgings and requests are too vague and indefinite to constitute an agreement under the act of March 2, 1919. (Minneapolis Steel & Machinery Co., Case No. 3032, VIII these Dec., 327.)

Where claimant was notified of an award of a contract there was an agreement within the terms of the act of March 2, 1919, even though the award was "revoked" without the contract having been signed by the United States. (West Coast Shipbuilding Co., Case No. 2296, VIII these Dec., 470.)

Where a contractor is advised by an agent of the Secretary of War that the Government will accept all bark-tanned leather manufactured by the contractor, special facilities being contemplated by both parties, and the contractor thereupon equips a plant and manufactures bark-tanned leather, the Government is obligated under the act of March 2, 1919, to compensate the contractor for its losses in manufacturing the leather. (Widen-Lord Tanning Co., Case No. 3029, VIII these Dec., 608.)

CORPORATIONS.

Foreign corporation organized under the laws of the Kingdom of Great Britain and Ireland, but licensed to maintain an agency and transact business in the State of New York, is to all intents and purposes a domestic corporation, and does not come under Section III of the act of March 2, 1919, relating to contracts entered into between the United States and nationals of a foreign country. (Commercial Bank of Spanish America (Ltd.), Case No. 3034, VIII these Dec., 665.)

COSTS.**COSTS, EXPERIMENTAL.**

See **CONTRACTS, IMPLIED.**

COSTS, LEGITIMATE.

A subcontractor under a standard cost-plus contract of the Construction Division terminated in accordance with the contract is not entitled to reimbursement as a part of the cost of the work for overhead expense in preparing to perform contract. (L. K. Comstock & Co., Case No. 3030, VIII these Dec., 332.)

A contractor is entitled to a reasonable allowance for factory management, or general administrative expense for services rendered in the construction of increased facilities specially provided for, in addition to the overhead expense applicable thereto. Such allowance is provided for in "Definition of 'Costs' Pertaining to Contracts." (Van Dorn Iron Works Co., Case No. 3028, VIII these Dec., 284.)

D.**DAMAGES.****DAMAGES, UNLIQUIDATED.****DAMAGES, LIQUIDATED.**

See **JURISDICTION.**

DECISIONS.**DECISIONS AFFIRMED.**

Upon consideration of the appeal and record in this case the decision of the Board of Contract Adjustment is hereby affirmed. (Aluminum Castings Co., Case No. 2797, VIII these Dec., 39.)

This claim was decided adversely to claimant by the Appeal Section, War Department Claims Board, February 4, 1921. On appeal to the Secretary of War, decision affirmed. (See Vol. VIII, p. 567.) (American Can Co., Case No. 2919, VIII these Dec., 738.)

Upon consideration of the appeal and record in this case, the decision of the Board of Contract Adjustment, denying relief, is hereby affirmed. (American Magnesium Corp., Case No. 1532, VIII these Dec., 40.)

The Appeal Section, War Department Claims Board, on April 13, 1921, rendered decision granting claimant partial relief. On appeal to the Secretary of War, affirmed. (See Vol. VIII, these decisions, p. 743.) (American Propeller Co., Case No. 3054, VIII these Dec., 760.)

Upon consideration of the record presented, the decision of the Board of Contract Adjustment is hereby affirmed. (Newton D. Baker, Secretary of War.) (American Sash & Door Co., Case No. 251, VIII these Dec., 33.)

This case was decided by the Board of Contract Adjustment on February 19, 1920, relief being denied. Claimant appealed to the Secretary of War, who remanded the case to the Appeal Section, War Department Claims Board, for further proceedings. On December 27, 1920, the Appeal Section issued its decision on reconsideration, granting partial relief, on which claimant also appealed to the Secretary of War. This decision was affirmed by the Secretary of War March 2, 1921. (See Vol. III, p. 862, and Vol. VIII, p. 59, and p. 368.) (Anniston Steel Co., Case No. 2248, VIII these Dec., 702.)

DECISIONS—Continued.

DECISIONS AFFIRMED—Continued.

Upon consideration of the appeal and record the decision of the Board of Contract Adjustment is hereby affirmed. (Anniston Steel Co., Case No. 2247, VIII these Dec., 41.)

This case was decided by the Board of Contract Adjustment March 25, 1920. Upon appeal to the Secretary of War, decision affirmed. (See Vol. IV, these decisions, p. 640.) (Antrim Iron Co., Case No. 193, VIII these Dec., 18.)

Upon consideration of the appeal and record in the case the decision of the Board of Contract Adjustment denying relief is hereby affirmed. (Art-In-Buttons (Inc.), Case No. 719, VIII these Dec., 54.)

This case was decided by the Board of Contract Adjustment June 25, 1920, relief being denied. On appeal to the Secretary of War, decision affirmed. (See Vol. VI, p. 545.) (Atchison, Topeka & Santa Fe R. R. Co., Case No. 2804, VIII these Dec., 34.)

Upon appeal to the Secretary of War the decision of the Appeal Section, War Department Claims Board, dated September 10, 1920, denying relief, was affirmed. (See Vol. VII, p. 577.) (Atchison, Topeka & Santa Fe R. R. Co., Case No. 2867, VIII these Dec., 219.)

Upon consideration of the appeal and record in this case the order of the Board of Contract Adjustment denying relief is hereby affirmed. (B. Axe. & Co., Case No. 2346, VIII these Dec., 42.)

Upon consideration of the appeal and the record in this case, I am convinced that there was no implied contract, such as is alleged by the claimant, and the decision of the Appeal Section, War Department Claims Board, is, therefore, affirmed. (Baltimore & Ohio R. R. Co., Case No. 2858, VIII these Dec., 8.)

On May 27, 1920, the Board of Contract Adjustment rendered decisions in the following cases, granting claimants partial relief. On appeal to Secretary of War, decisions of Board affirmed. (See Vol. V these decisions, p. 828.) (The Barrett Co., and related cases, Case No. 1821, VIII these Dec., 713.)

After careful consideration of the record in this matter, the decision of the Board of Contract Adjustment is hereby affirmed in accordance with the accompanying recommendation of the special advisers. It is further directed that the entire record be transmitted to the Auditor for the War Department for his information and that the claimant be advised that any further application for the relief here sought should be addressed to the Auditor for the War Department or to the Comptroller of the Treasury of the United States. (Belden-Porter Gray Co., Case No. 1929, VIII these Dec., 722.)

Upon consideration of the appeal and record in the foregoing case I am convinced that the decision of the Board of Contract Adjustment of June 30, 1920, as amended by the decision of the Appeal Section, War Department Claims Board, on August 26, 1920, is correct, and relief in addition to that therein granted is denied. (Biggam Trailer Corp., Case No. 1986, VIII these Dec., 222.)

Upon consideration of the record and appeal in this case the decision of the Board of Contract Adjustment denying relief is hereby affirmed. (The Bloch Co., Case No. 2306, VIII these Dec., 43.)

Where claimant had a contract with the United States Government to furnish 6,400 tons of steel and, in furnishing same, delivered to and the Government accepted, 72,300 pounds of steel in excess of the

DECISIONS—Continued.**DECISIONS AFFIRMED—Continued.**

amount called for in the contract, the Government is obligated to reimburse claimant for the said excess shipment of steel at the rate specified in the contract of December 1, 1917, under which contract the shipments in question were made. This case was decided by this Board on October 13, 1920, and claimant, not being satisfied with same, asked for a reconsideration, which was granted. For statement of facts, see Decision of the Board dated October 13, 1920 (Vol. VII, p. 915). (Cambria Steel Co., Case No. 2792, VIII these Dec., 378.)

Upon consideration of the record and appeal in the above-entitled case, the action of the Appeal Section, War Department Claims Board, is affirmed. (Lawrence F. Cashman, Trustee in Bankruptcy for the Bell Manufacturing Co., Case No. 3069, VIII these Dec., 860.)

This claim was decided by the Board of Contract Adjustment June 25, 1920. On appeal to the Secretary of War, the decision of the board was affirmed. (For statement of facts and decisions, see these decisions, Volume VI, page 531.) (Chesapeake & Potomac Telephone Co., Case No. 1702, VIII these Dec., 15.)

This claim was disposed of by the Appeal Section, War Department Claims Board, September 1, 1920, by denying relief to claimant (Vol. VII, p. 540). On appeal to Secretary of War, decision affirmed. (Chicago, Milwaukee & St. Paul R. R. Co., Case No. 2879, VIII these Dec., 230.)

This claim was decided by the Board of Contract Adjustment March 31, 1920. Upon appeal to the Secretary of War, decision affirmed. (See Vol. IV, p. 640, these decisions.) (Cleveland Cliffs Iron Co., Case No. 188, VIII these Dec., 19.)

After careful consideration of the record, it is my opinion that no agreement, either expressed or implied, was entered into between the Collier Manufacturing Co. and any officer or agent acting under the authority, discretion, or instruction of the Secretary of War, or of the President, within the purview of the act of March 2, 1919, and relief as prayed for is, therefore, denied. (Collier Manufacturing Co., Case No. 726, VIII these Dec., 8.)

Upon appeal to the Secretary of War, the decision of the Appeal Section, War Department Claims Board, dated February 26, 1921, was affirmed. (See Vol. VIII, these decisions, p. 655.) (Commercial Bank of Spanish America, Case No. 3034, VIII these Dec., 729.)

This claim was disposed of by the Appeal Section, War Department Claims Board, December 21, 1920, by denying relief to claimant. On appeal to the Secretary of War, decision affirmed. (See Vol. VIII, these decisions, p. 332.) (L. K. Comstock Co., Case No. 3030, VIII these Dec., 728.)

The records of the Appeal Section, War Department Claims Board, do not show that this case was ever formally appealed to the Secretary of War. However, on February 18, 1921, the following document and order of the Secretary of War was received and is published in connection with said case. (For decision of Appeal Section of Jan. 29, 1921, see Vol. VIII, these decisions, p. 529.) (Dale Machinery Co., Case No. 3040, VIII these Dec., 533.)

Upon appeal to the Secretary of War, the decision of the Board of Contract Adjustment, dated March 31, 1920, was affirmed. (See

DECISIONS—Continued.

DECISIONS AFFIRMED—Continued.

Vol. IV, these decisions, p. 640.) (Desmond Charcoal & Chemical Co., VIII these Dec., 20.)

This case was decided by the Board of Contract Adjustment on March 26, 1920, relief being granted in part. On appeal to the Secretary of War, the decision of the Board of Contract Adjustment was affirmed. (See Vol. IV, these decisions, p. 669.) (Dill & Collins Co., Case No. 2254, VIII these Dec., 720.)

Upon appeal to the Secretary of War, decision of the Appeal Section, War Department Claims Board, dated November 15, 1920, was affirmed. (See Vol. VIII, these decisions, p. 161.) (Duesenberg Motor Corp., Case No. 3024, VIII these Dec., 240.)

Upon appeal to Secretary of War, the decision of the Board of Contract Adjustment, dated January 27, 1920, was affirmed in accordance with the recommendation of special advisers. (See Vol. III, p. 691.) (Eastern Malleable Iron Co., and related cases, Case No. 2047, VIII these Dec., 703.)

Upon consideration of the appeal and record in this case the decision of the Board of Contract Adjustment is affirmed. (Eastern Zinc Refining Co., Case No. 521, VIII these Dec., 44.)

Upon consideration of the record presented the accompanying decision of the Board of Contract Adjustment, dated June 24, 1920, is hereby approved and affirmed. A certificate of fair value and voucher will issue to claimant for \$7,205.19, covering 2,007 yards of puttee cloth taken over by the United States, if such certificate and voucher have not already issued. (Farragut Textile Manufacturing Co., Case No. 246, VIII these Dec., 45.)

On June 11, 1920, the Board of Contract Adjustment rendered a decision in this case granting relief in part. On appeal to the Secretary of War, decision affirmed. (See Vol. VI, p. 870.) (Fellows Medical Manufacturing Co., Case No. 2504, VIII these Dec., 35.)

Upon consideration of the appeal and the record I am convinced that the decision of the Board of Contract Adjustment made in this case denying relief is correct, and the same is hereby affirmed. (Field Manufacturing Co., Case No. 370, VIII these Dec., 4.)

On appeal to the Secretary of War the decision of the Appeal Section, War Department Claims Board, denying relief was affirmed. (See Vol. VIII, p. 349.) (Fitzgerald Construction Co., Case No. 3043, VIII these Dec., 404.)

On reconsideration the decision dated July 21, 1920, is affirmed. The facts are fully stated in that decision. Claim is under G. O. 103 for \$24,147.34. (See Vol. VII, pt. 1, p. 103.) (The Foundation Co., Case No. 2777, VIII these Dec., 417.)

Upon consideration of the appeal and record in this case, I am convinced the decision of the Board of Contract Adjustment denying relief is correct, and the same is hereby affirmed. (Fries & Fries, Case No. 490, VIII these Dec., 51.)

Upon appeal to the Secretary of War, the decision of the Board of Contract Adjustment, dated June 4, 1920, was affirmed. (See Vol. V, p. 966.) (T. A. Gillespie Co., 2497, VIII these Dec., 27.)

Decisions were rendered in this case by the Board of Contract Adjustment on January 27, 1920, and May 26, 1920. On appeal to the Secretary of War, decision of May 26, 1920, affirmed. (See Vol. III,

DECISIONS—Continued.

DECISIONS AFFIRMED—Continued.

p. 216, and Vol. V, p. 782, these decisions.) (Globe Automatic Sprinkler Co., Case No. 2271, VIII these Dec., 28.)

This claim was decided by the Board of Contract Adjustment June 5, 1920, by denying relief. On appeal to the Secretary of War, decision affirmed. (See these decisions, Vol. V, p. 1019.) (Globe Automatic Sprinkler Co., Case No. 2453, VIII these Dec., 16.)

The Appeal Section, War Department Claims Board, on February 3, 1921, rendered decision granting claimant partial relief. On appeal to the Secretary of War, affirmed. (See Vol. VIII, these decisions, p. 558.) (Goddard Tool Co., Case No. 3045, VIII these Dec., 740.)

On February 21, 1921, a decision was rendered by the Appeal Section, War Department Claims Board, granting claimant partial relief. Upon appeal to Secretary of War, the decision was affirmed. For statement of facts in this case, see Volume IV, page 542; Volume VII, page 155, Volume VIII, pages 629 and 389, and page 741. (Jacob Goldman, receiver for the Gas Oil Chemical Co., Case No. 1970, these Dec., 389.)

Upon consideration of the appeal and record in the foregoing case, I believe that the action of the Board of Contract Adjustment, denying relief, is correct, and the same is hereby affirmed. (J. & F. Goldstone & Co., Case No. 1764, VIII these Dec., 238.)

The Appeals Section, War Department Claims Board, on February 25, 1921, rendered decision granting claimant partial relief. On appeal to the Secretary of War, affirmed. (See Vol. VIII, these decisions, p. 742.) (Harry F. Hann, Case No. 3053, VIII these Dec., 648.)

On appeal to the Secretary of War the decision of the Board of Contract Adjustment, dated May 18, 1920, denying relief, was affirmed. (See Vol. V, p. 475.) (The Haynes Automobile Co., Case No. 2549, VIII these Dec., 220.)

The Appeals Section, War Department Claims Board, rendered a decision in the above-entitled claim July 23, 1920, denying relief. On appeal to the Secretary of War this decision was affirmed. (See Vol. VII, p. 84.) (Hendrix College, Case No. 2525, VIII these Dec., 242.)

This case was decided by the Appeals Section, War Department Claims Board, January 29, 1921, relief being denied in part. On appeal to the Secretary of War the decision of the Appeals Section was affirmed. (See Vol. VIII, p. 535.) (Holt Manufacturing Co., Case No. 3035, VIII these Dec., 412.)

This case was decided by the Appeal Section, War Department Claims Board, July 31, 1920, relief being granted in part. On appeal to the Secretary of War, decision affirmed. (See Vol. VII, p. 150.) (Joliet Forge Co., Case No. 2677, VIII these Dec., 227.)

Upon appeal to the Secretary of War, the decision of the Board of Contract Adjustment, dated March 31, 1920, was affirmed. (See Vol. IV, these decisions, p. 640.) (Thomas Keery, Case No. 124, VIII these Dec., 21.)

Upon careful consideration of the record in this matter, the decision of the Board of Contract Adjustment is hereby affirmed in accordance with the accompanying recommendation of the Special Advisers. (Robert G. Lassiter, Case No. 744, VIII these Dec., 727.)

DECISIONS—Continued.**DECISIONS AFFIRMED—Continued.**

Upon consideration of the record in this matter, the decision of the Board of Contract Adjustment is hereby affirmed in accordance with the accompanying recommendation. (A. C. Lawrence Leather Co., Case No. 575, VIII these Dec., 1.)

Decisions were rendered in this case by the Board of Contract Adjustment on May 6, 1920 (Vol. V, p. 183), and by the Appeal Section, War Department Claims Board, on November 6, 1920 (Vol. VIII, p. 142). On appeal to the Secretary of War the decision of the Appeal Section, War Department Claims Board, was affirmed. (A. C. Lawrence Leather Co., Case No. 1933, VIII these Dec., 236.)

This claim was decided by the Appeal Section, War Department Claims Board, 1920. Upon appeal to the Secretary of War, decision affirmed. (See Vol. V, these decisions, p. 466.) (Henry H. Lippert, Case No. 331, VIII these Dec., 30.)

This claim was decided by the Appeal Section, War Department Claims Board, October 5, 1920. Upon appeal to the Secretary of War, decision affirmed. (See Vol. VII, these decisions, p. 839.) (E. L. Long, Case No. 2909, VIII these Dec., 65.)

Upon careful consideration of the record in this matter, the decision of the Board of Contract Adjustment is hereby affirmed in accordance with the accompanying recommendations of the special advisers. (R. H. Long, Case No. 2522, VIII these Dec., 723.)

There is an appeal from the disallowance of a number of items by the ordnance section in an award under a suspended proxy-signed contract. The individual items are discussed and the action of the ordnance section affirmed. (Lutz Co., Case No. 3021, VIII these Dec., 314.)

This claim was decided adversely to claimant by the Appeal Section, War Department Claims Board, February 4, 1921. On appeal to the Secretary of War, decision affirmed. (See Vol. VIII, p. 314.) (W. H. Lutz Co., Case No. 3021, VIII these Dec., 737.)

This claim was decided by the Appeal Section, War Department Claims Board, January 29, 1921, relief being denied. Claimant appealed to Secretary of War, who, on March 23, 1921, affirmed the decision of this Board. (See Vol. VIII, p. 540.) (J. E. Lyons, Case No. 3015, VIII these Dec., 739.)

Upon appeal to the Secretary of War, the decision of the Board of Contract Adjustment, dated May 22, 1920, was affirmed. (See Vol. V, these decisions, p. 669.) (Maguire & Co., Case No. Sales BCA-4, VIII these Dec., 22.)

This claim was decided by the Board of Contract Adjustment on February 25, 1920, relief being granted in part. (For statement of facts and decision, see Vol. III, p. 994, and for final order issued in accordance with decisions of Secretary of War, see Vol. VIII, p. 402.) (Marsh Manufacturing Co., Case No. 2226, VIII these Dec., 401.)

Upon appeal to the Secretary of War, the decision of the Board of Contract Adjustment, dated April 6, 1920, was affirmed. (See Vol. VI, p. 735.) (Melville Corbett Co., Case No. 197, VIII these Dec., 23.)

This claim was decided by the Board of Contract Adjustment June 23, 1920, relief being denied. Claimant appealed to the Secretary of

DECISIONS—Continued.

DECISIONS AFFIRMED—Continued.

War, who, on December 4, 1920, approved and affirmed the decision of this board. (See Vol. VI, p. 504.) (A. C. Messler Co., Case No. 2749, VIII these Dec., 221.)

Upon consideration of the record in this matter the decision of the Board of Contract Adjustment is hereby affirmed in accordance with the accompanying recommendation. (Midvale Steel & Ordnance, Case No. 2558, VIII these Dec., 5.)

Upon consideration of the record in this matter, the decision of the Board of Contract Adjustment is hereby affirmed. (Milwaukee Patent Leather Co., Case No. 329, VIII these Dec., 7.)

On June 3, 1920, the Board of Contract Adjustment issued its decision (published in Vol. VI).

On August 11, 1920, the Secretary of War reversed the decision of the Board of Contract Adjustment and ordered that the same be set aside and vacated, and on August 28, 1920, the appeal section, War Department Claims Board, formerly Board of Contract Adjustment, issued its opinion setting aside and vacating the decision of the Board of Contract Adjustment of June 3, 1920, and canceling, revoking, and recalling its document setting forth the nature, terms, and conditions of the agreement and certificate form "C."

On November 30, 1920, the Secretary of War in the following decision ordered his former opinion reversed and the opinion of the Board of Contract Adjustment of June 3, 1920, together with certificate form "C" and the document setting forth the nature, terms, and conditions of the agreement, reinstated and made of full effect.

For all the facts in the case reference is made to the decision of the Board of Contract Adjustment of June 3, 1920 (published in Vol. VI.) (Employees of Minneapolis Steel & Machinery Co., Case No. 2099, VIII these Dec., 66.)

Upon appeal to the Secretary of War, the decision of the Board of Contract Adjustment, dated April 3, 1920, was affirmed. (See Vol. IV, these decisions, p. 902.) (Model Steam Laundry, Case No. 1767, VIII, these Dec., 24.)

This claim was decided by the Board of Contract Adjustment adversely to claimant on June 5, 1920. On appeal to Secretary of War, affirmed. (For decision of Board of Contract Adjustment, see Vol. VI, these decisions, p. 23.) (Monmouth Chemical Co., Case No. 2641, VIII these Dec., 241.)

This claim was decided adversely to claimant by the Board of Contract Adjustment on June 30, 1920. On appeal to the Secretary of War the decision of the Board of Contract Adjustment was affirmed. (For statement of facts and decision, see Vol. VI, these decisions, p. 648.) (Mueller Metals Co., Case No. 1248, VIII these Dec., 406.)

Upon appeal to the Secretary of War, the decision of the Appeal Section, War Department Claims Board, dated September 29, 1920, was affirmed. (See Vol. VII, p. 700.) (Mueller Metals Co., Case No. 2834, VIII these Dec., 407.)

This claim was decided adversely to claimant by the Appeal Section, War Department Claims Board, on March 1, 1921. On appeal to Secretary of War, decision affirmed in part. (See Vol. VIII,

DECISIONS—Continued.

DECISIONS AFFIRMED—Continued.

p. 662. (New York Air Brake Co., Case No. 3026, VIII these Dec., 761.)

Upon appeal to the Secretary of War the decision of the Appeal Section, War Department Claims Board, dated October 1, 1920, was affirmed. (See Vol. VII, p. 788.) (North Star Chemical Works, Case No. 2843, VIII these Dec., 228.)

Upon consideration of the appeal and record in this case the decision of the Board of Contract Adjustment is affirmed in accordance with the accompanying views of the special advisers. (Organic Salt & Acid Co., Case No. 2369, VIII these Dec., 73.)

On March 27, 1920, the Board of Contract Adjustment rendered decision granting claimant partial relief. On appeal to Secretary of War, decision affirmed. (See Vol. IV, p. 719.) (Pennsylvania Tank Car Co., Case No. 1829, VIII these Dec., 715.)

This claim was decided by the Board of Contract Adjustment June 22, 1920, denying relief to claimant. Upon appeal to the Secretary of War, decision affirmed. (See Vol. VI these decisions, p. 466.) (Wm. B. Perry Electric Co., Case No. 2660, VIII these Dec., 29.)

Upon consideration of the record presented the accompanying decision of the Board of Contract Adjustment is hereby approved and affirmed. (Piedmont & Northern Railway Co., Case No. 2700, VIII these Dec., 31.)

Upon consideration of the appeal and record in this case, I am convinced that the action of the appeal section of the War Department Claims Board is correct, and additional relief is denied. (Pittsburgh Model Engine Co., Case No. 2138, VIII these Dec., 56.)

This claim was decided adversely to claimant by the Appeal Section, War Department Claims Board, October 19, 1920. On appeal to the Secretary of War, decision affirmed. (For statement of facts and decision, see Vol. VII, p. 951.) (Precision Optical Co., Case No. 2780, VIII these Dec., 736.)

Upon consideration of the appeal and record in this case the decision of the Board of Contract Adjustment is affirmed. (Preston Chemical Co., Case No. 2492, VIII these Dec., 57.)

On June 24, 1920, the Board of Contract Adjustment rendered a decision denying relief in above case. Claimant appealed to the Secretary of War, who, on December 18, 1920, affirmed the decision of the board. (See Vol. VI, these decisions, p. 510.) (Raymond Engineering Corp., Case No. 2470, VIII these Dec., 231.)

Upon consideration of the appeal and brief in the above-entitled case, I am convinced that the letter of the Appeal Section, War Department Claims Board, of October 9, 1920, is correct, and the same is hereby affirmed. (Remington Arms Union Metallic Cartridge Co., Case No. 1553, VIII these Dec., 239.)

Upon consideration of the appeal and record in this case I am convinced that the decision of the Board of Contract Adjustment denying relief is correct, and the same is hereby affirmed. (See Vol. VI, these decisions, p. 665.) (Republic Iron & Steel Co., Case No. 1502, VIII these Dec., 58.)

On March 24, 1920, a decision was rendered by the Board of Contract Adjustment denying claimant relief. On appeal to Secretary of War, decision affirmed. (See Vol. IV, these decisions, p. 608.)

DECISIONS—Continued.**DECISIONS AFFIRMED—Continued.**

affirmed the decision of this board. (Vol. VIII, p. 129.) (Rollin Chemical Co., Case No. 2911, VIII these Dec., 237.)

Upon consideration of this case and in accordance with the attached recommendation of my advisers, the decision of the Board of Contract Adjustment is affirmed. (L. Richardson & Co., Case No. 1844, VIII these Dec., 12.)

This claim was decided by the Appeal Section, War Department Claims Board, November 9, 1920, by denying relief to claimant. Claimant appealed to the Secretary of War who, on December 22, 1920, affirmed the decision of this board. (Vol. VIII, p. 129.) Rollin Chemical Co., Case No. 2911, VIII these Dec., 237.)

Upon consideration of the record and appeal in the above-entitled case, the decision of the Appeal Section is hereby affirmed. (Rome Brass & Copper Co., Case No. 2916, VIII these Dec., 233.)

Claim, as amended, is for \$13,223.51, and is presented as a class B claim under the act of March 2, 1919. Claim was decided by the Board of Contract Adjustment on March 15, 1920. On appeal the Secretary of War reversed that decision and ordered another hearing. On October 4, 1920, the Appeal Section entered a decision again denying relief. Claimant asked for reconsideration of that decision, which was granted. Held, it is unnecessary to decide whether or not the material in question was purchased upon the faith of an informal agreement, as the proof shows that claimant used the material in its commercial business and suffered no loss thereon. Claimant is not entitled to reimbursement for prospective or possible profits it might have made if it had bought material on the market at less than the price paid for the material in question. The true test is, Did the contractor sustain a loss on the entire transaction? (For former decision, see Vol. IV, p. 104 and Vol. VII, p. 813.) (St. Louis Tin & Sheet Metal Working Co., Case No. 553, VIII these Dec., 593.)

Upon consideration of the appeal and record in this case I am convinced that claimant is not entitled to recover, and final order denying relief so far as the War Department is concerned, is hereby entered. (Charles Schaffer & Sons, Case No. 2810, VIII these Dec., 224.)

This claim was decided by the Appeal Section, War Department Claims Board, on July 15, 1920, by affirming the decision of the Transportation Claims Board denying relief. (For statement of facts and decisions, see Vol. VII, p. 38.) (Seaboard Air Line Railroad Co., Case No. 2626, VIII these Dec., 397.)

This claim was disposed of by the Appeal Section, War Department Claims Board, July 29, 1920, by denying relief to claimant. The decision of Board denying relief affirmed on appeal to Secretary of War. (See Vol. VII, these decisions, p. 111.) (Southern Overall Co., Case No. 2781, VIII these Dec., 52.)

This claim was decided by the Board of Contract Adjustment April 18, 1920. Upon appeal to the Secretary of War, decision affirmed. (See Vol. V, these decisions, p. 45.) (Sterling Engine Co., Case No. 712, VIII these Dec., 32.)

DECISIONS—Continued.**DECISIONS AFFIRMED—Continued.**

Upon consideration of the record and appeal in this case the decision of the Board of Contract Adjustment denying relief in this claim is hereby affirmed. (The Truscon Steel Co., Case No. 2436, VIII these Dec., 46.)

Upon consideration of the entire record, the decision of the Board of Contract Adjustment is hereby approved. (The Union Twist Drill Co., Case No. 2379, VIII these Dec., 37.)

On July 15, 1920, the Appeal Section, War Department Claims Board, rendered a decision denying relief in above-entitled claim, and on appeal the Secretary of War, on December 16, 1920, affirmed this decision. (See Vol. VII, p. 40.) (The United Gas & Electric Eng. Corp., Case No. 2651, VIII these Dec., 229.)

This claim was disposed of by the Board of Contract Adjustment March 8, 1920, relief being denied. On appeal to the Secretary of War this decision was affirmed. (For statement of claim and decision, see Vol. IV, these decisions, p. 325.) (United States Bedding Co., Case No. 697, VIII these Dec., 409.)

These claims were disposed of by the Appeal Section, War Department Claims Board, February 21, 1921, by denying relief to claimant. On appeal to the Secretary of War, decisions affirmed. (See Vol. VIII, p. 613.) (United States Cartridge Co., Cases Nos. 3049 and 3051, VIII these Dec., 776.)

On June 8, 1920, the Board of Contract Adjustment rendered a decision granting relief in part. Decision of Board affirmed on appeal to Secretary of War. (See Vol. VI, p. 65.) (United States Industrial Chemical Co., Case No. 10, VIII these Dec., 38.)

On August 3, 1920, the Appeal Section, War Department Claims Board, issued a decision in the above-entitled case denying relief. Upon application of claimant a rehearing was held on September 13, at which time it was determined that the former decision should be reaffirmed. Claimant then appealed to the Secretary of War, who, on December 14, 1920, affirmed the decision of the Appeal Section, War Department Claims Board. (For full statement of facts, see Vol. VII, p. 213 and Vol. VII, p. 695.) (Virginia Red Oil Products Co., Case No. 2779, VIII these Dec., 226.)

The Board of Contract Adjustment decided this case adversely to claimant June 19, 1920, and on appeal to the Secretary of War this decision was affirmed. (See Vol. VI, these decisions, p. 963.) (War Crete Shipbuilding Co., Case No. 342, VIII these Dec., 410.)

Appeal to the Secretary of War the decision of the Appeal Section, War Department Claims Board, was affirmed. (See Vol. VII, p. 359.) (Western Cartridge Co., Case No. 2785, VIII these Dec., 234.)

This claim was decided by the Board of Contract Adjustment June 17, 1920, relief being denied. On appeal, the Secretary of War affirmed the decision of the Board of Contract Adjustment and directed that further proceedings be held in this case by the president of the War Department Claims Board. In accordance with the order of the Secretary this claim was transmitted to the War Department Claims Board November 13, 1920. (Vol. VI, these decisions, p. 917.) (Western Industries Co., Case No. 2491, VIII these Dec., 11.)

DECISIONS—Continued.**DECISIONS AFFIRMED—Continued.**

Upon appeal to the Secretary of War the decision of the Board of Contract Adjustment dated June 19, 1920, was affirmed. (See Vol. VI, these decisions, p. 403.) (Cyrus French Wicker, Case No. 1144, VIII these Dec., 10.)

Upon appeal to the Secretary of War, the decision of the Appeal Section, War Department Claims Board, dated March 1, 1921, was affirmed. (See Vol. VIII, these decisions, p. 385.) (Winchester Repeating Arms Co., Case No. 3037, VIII these Dec., 777.)

Upon appeal to the Secretary of War the decision of the Board of Contract Adjustment, dated March 29, 1920, denying relief was affirmed. (See Vol. IV, p. 733.) (Wisconsin Motor Manufacturing Co., Case No. 2318, VIII these Dec., 235.)

This claim was disposed of by the Appeal Section, War Department Claims Board, November 15, 1920, by denying relief. On appeal to the Secretary of War this decision was affirmed. (For statement of facts and decision, see Vol. VIII, p. 163.) (Wood Art Machine Co., Case No. 2999, VIII these Dec., 225.)

These claims were disposed of by the Board of Contract Adjustment April 3, 1920, by denying relief to claimant (Vol. IV, p. 850). Claimant appealed to the Secretary of War, who, on the 18th day of December, 1920, affirmed the decision of this Board. (Wright Works, Cases Nos. 2059 and 2061, VIII these Dec., 232.)

These claims were decided by the Appeal Section, War Department Claims Board, August 23, 1920, relief being denied in part. On appeal to the Secretary of War, the decision of the Appeal Section, War Department Claims Board, was affirmed. For statement of facts and decisions, see these decisions, Vol. VII, p. 393. (Young, Corley & Dolan Co. (Inc.), Cases Nos. 2571, 2712, 2534, 2710, 2711, 2714, VIII these Dec., 9.)

DECISIONS, MODIFIED.

A decision in this case was rendered by the Board of Contract Adjustment of June 30, 1920, denying claimant relief. On appeal to the Secretary of War this decision was reversed and the claim was returned to the Board of Contract Adjustment for further consideration under direction of the Secretary of War. The former decision of the Board of Contract Adjustment was set aside and vacated and the record transmitted to the Ordnance Salvage Board in accordance with the directions of the Secretary of War. (For full statement of facts and former decision, see Vol. VI, p. 577.) (Aeronautical Equipment Co. (Inc.), Case No. Sales BCA 17, VIII these Dec., 262.)

This claim was decided by the Board of Contract Adjustment adversely to claimant on June 30, 1920. On appeal to the Secretary of War, decision of the Board vacated. (See Vol. VI, p. 577.) (Aeronautical Equipment Co. (Inc.), Case No. Sales BCA 17, VIII these Dec. 53.)

This claim was decided by the Board of Contract Adjustment May 15, 1920, relief being denied. On appeal to the Secretary of War the decision of the Board denying relief was remanded to the Board for further proceedings. (For decision of May 15, 1920, see Vol. V, these decisions, p. 426.) (American Steel & Wire Co., Case No. 1672, VIII these Dec., 223.)

DECISIONS—Continued.

DECISIONS, MODIFIED—Continued.

On January 27, 1920, the Board of Contract Adjustment rendered a decision in the following cases, granting claimants partial relief. On appeal to Secretary of War, case remanded for further proceedings. (See Vol. III, these decisions, p. 709.) (American Tube & Stamping Co., A. P. Swoyer Co., and Bridgeport Brass Co., cases No. 1979, 2167, and 1993, VIII these Dec., 710.)

Decision in this case was rendered by the Board of Contract Adjustment February 19, 1920, denying relief. On appeal, the Secretary of War remanded the case to the Board for further proceedings. (For decision of Feb. 19, 1920, see Vol. III, p. 862.) (Anniston Steel Co., Case No. 2248, VIII these Dec., 59.)

A decision in this case was rendered by the Board of Contract Adjustment on February 10, 1920, granting claimant partial relief. On appeal to the Secretary of War this decision was directed to be modified so as to grant claimant full relief and was returned to the Appeal Section, War Department Claims Board, for further consideration. The former decision of the Board of Contract Adjustment has been modified and the entire record transmitted to the Purchase Section, War Department Claims Board, for action in accordance with the decision of the Secretary of War. (For full statement of facts and former decision, see Vol. III, p. 624, these decisions.) (Arthur Vulcanizing Machine Co., Case No. 1705, VIII these Dec., 343.)

The Board of Contract Adjustment rendered a decision in this case on February 10, 1920. On appeal to the Secretary of War it was remanded to the Board for modification. (For statement of facts and decision of February 10, 1920, see Vol. III, these decisions, p. 624.) (Arthur Vulcanizing Machine Co., Case No. 1705, VIII these Dec., 341.)

The Appeal Section, War Department Claims Board, rendered a decision in this case July 22, 1920, denying relief. Claimant requested a rehearing, which was granted, and on October 14, 1920, the Appeal Section rendered another decision confirming its former decision.

Claimant appealed to the Secretary of War, who, on January 28, 1921, vacated the decision of the Appeal Section and directed that an award be made and entered by the Appeal Section, War Department Claims Board. (See Vol. VII, p. 93, and Vol. VII, p. 925.) (Autoyre Co., Case No. 2667, VIII these Dec., 585.)

This claim was decided by the Board of Contract Adjustment June 12, 1920. On appeal to the Secretary of War, the decision of the board was affirmed except as to Item 1, and was remanded to the appeal section, War Department Claims Board, for further proceedings on this item. (For decision of June 12, 1920, see Vol. VI, p. 884, these decisions.) (Breese Aircraft Corporation, Case No. 2456, VIII these Dec., 63.)

This claim was decided by the Board of Contract Adjustment in a supplemental decision dated June 19, 1920. Upon appeal to the Secretary of War by the vice chairman of the War Department Claims Board the decision of the Board of Contract Adjustment was reversed. (For facts and decision and decision of Secretary of War, see Vol. VI, p. 983, and Vol. III, pt. 1, p. 61.) (C. & C. Raincoat Co., Case No. 2255, VIII these Dec., 257.)

DECISIONS—Continued.**DECISIONS, MODIFIED—Continued.**

The Board of Contract Adjustment rendered a decision in this case granting relief. On appeal the Secretary of War directed that an order denying relief issue. (See Vol. IV, these decisions, p. 1021, and Vol. VI, p. 983.)

Upon consideration of the appeal and record in the above case I am convinced that the action of the Board of Contract Adjustment is not correct and that an order denying relief should be entered so far as any increased price under proxy signed contract No. 2060-B is concerned. (C. & C. Raincoat Co., Case No. 2255, VIII these Dec., 55.)

Facts are stated in opinion denying relief reported in Volume V, part 1, at page 151. On appeal the Secretary of War instructed this section to find an agreement between claimant and the Ordnance Department. Held agreement exists. (California Cap Co., Case No. 1454, VIII these Dec., 76.)

This case was decided May 3, 1920, and claimant was given partial relief. An appeal was noted by the Air Service representative of the War Department Claims Board, and the Secretary of War forwarded the same to this Board for further consideration. On further consideration it appeared that the raw material in question was not purchased after the receipt of the contract. Therefore all relief prayed for is denied. (For decision of May 3, 1920, see Vol. V, these decisions, p. 124.) (Cambria Steel Co., Case No. 2106, VIII these Dec., 373.)

A claim having been presented under the act of March 2, 1919, commonly called the Dent Act, by Messrs. George A. Carden and Anderson T. Herd, based upon an agreement under which the United States acquired title to seven ships:

Now, by virtue of the authority in me vested by said act, I do hereby award to the said Carden & Herd, in full adjustment, payment, and discharge of said claim, exclusive of prospective profits, the sum of five hundred fifty thousand dollars (\$550,000.00), and I hereby find and declare that no subcontractors are interested in said claim:

And I hereby direct that the sum of five hundred fifty thousand dollars (\$550,000.00), awarded as aforesaid, be paid to the said Carden & Herd out of the unexpended balance of any appropriation available for that purpose. (Carden & Herd, Case No. 2664, VIII these Dec., 861.)

Facts as stated in decision, in part denying and in part granting relief, reported in Volume VI, Part 1, page 246. On appeal the Secretary of War approved the opinion of the Board of Contract Adjustment except as to its decision with reference to item L, involving attorney's fees. As to this item the Secretary directed that the Appeal Section determine what amount, if any, of the attorney's fees claimed was reasonably and in good faith incurred in connection with the performance of the contract. The Appeal Section reconsidered the matter in the light of previous testimony and of additional affidavits filed and determined that the amount of attorney's fees so expended was \$1,000, and that claimant was entitled to the unamortized portion thereof, or the sum of \$624. (Chamberlain Machine Works, Case No. 2480, VIII these Dec., 298.)

DECISIONS—Continued.**DECISIONS, MODIFIED—Continued.**

This claim was decided by the Board of Contract Adjustment May 12, 1920, relief being granted and an award being issued. The vice chairman of the War Department Claims Board addressed a memorandum to the Judge Advocate General requesting an opinion as to the legality of the award. The Judge Advocate General returned the memorandum by first indorsement, holding that no legal remedy existed for the loss alleged by claimant, and that therefore no valid award could be made. The claim was returned to the Appeal Section and a decision was rendered vacating the former decision of the Board of Contract Adjustment of May 12, 1920, and denying claimant any relief. (For findings of fact, see former decision of the Board of Contract Adjustment, May 12, 1920, Vol. V., p. 329, these decisions.) (Fred G. Clark, Case No. 2532, VIII these Dec., 380.)

Cases Nos. 2629, 2630, and 2632 were decided by the Board of Contract Adjustment on June 3, 1920, and case No. 2631 was decided by the said board on June 4, 1920, certain relief being granted the claimant. On appeal certain portions of the said decision of the Board of Contract Adjustment were affirmed and the said four cases were forwarded to the Ordnance Section, War Department Claims Board, for further action. (For statement of fact and decision, see Cases Nos. 2629, 2630, and 2632, decided June 3, 1920, and Case No. 2631, decided June 4, 1920, Vol. V, these decisions, p. 960.) (Derby Manufacturing Co., Cases No. 2629-2632, VIII these Dec., 121.)

This claim was decided by the Appeal Section, War Department Claims Board, July 23, 1920, relief being denied. Claimant requested a rehearing, which was granted, and on January 3, 1921, another decision was rendered affirming and approving the previous decision. Claimant then appealed to the Secretary of War, who, on March 14, 1921, directed that the decision of the Appeal Section be vacated and action taken in accordance with memorandum of the vice chairman, War Department Claims Board. (See Vol. VII, p. 100, Vol. VIII, p. 417; and p. 733.) (The Foundation Co., Case No. 2777, VIII these Dec., 730.)

This claim was decided by the Board of Contract Adjustment April 3, 1920, by denying relief to claimant. Claimant appealed to the Secretary of War, who, on November 13, 1920, remanded the case to the Board for further proceedings. For decision of April 3, 1920, see Vol. IV, p. 909. (French Manufacturing Co., Case No. 1148, VIII these Dec., 26.)

The Board of Contract Adjustment rendered a decision April 3, 1920, denying relief to claimant. On appeal, the Secretary of War directed that the decision of the Board be set aside and further proceeding held. (For first decision, see Vol. IV, p. 911.) (French Manufacturing Co., Case No. 2523, VIII these Dec., 36.)

This claim was decided by the Board of Contract Adjustment on April 22, 1920. Relief was denied the claimant in so far as any contract existed between the claimant and the United States Government. The Board further held that the settlement contract entered into between the United States and the Garford Motor Truck Co. was void as having been entered into without consideration and

DECISIONS—Continued.

DECISIONS, MODIFIED—Continued.

without the authority of the Secretary of War, and without warrant in law.

The Secretary of War, through his advisers, sets aside so much of the decision of the Board of Contract Adjustment as finds the settlement contract of May 14, 1919, void and illegal and directs that the said settlement contract be affirmed without prejudice, however, to the right of the Garford Motor Co. to open the same in a proper case; and that the said decision of the Board of Contract Adjustment be affirmed in so far as it denies all relief to the Teetor-Hartley Motor Co. either as a direct claimant against the Government or as a subcontractor under the Wisconsin Motor Co., and the Garford Motor Truck Co. (For statement of facts and decision, see Decision of the Board of Contract Adjustment under date of Apr. 22, 1920.) (Garford Motor Truck Co., Case No. 1598, VIII these Dec., 81.)

March 22, 1920, the Board of Contract Adjustment issued a decision disallowing claimant's entire claim. Upon recommendation of the standing committee on rehearings, a rehearing was had, and, on July 30, 1920, the Appeal Section, War Department Claims Board, rendered a decision holding that claimant was entitled to an adjustment of its contract in accordance with the supply circulars, but that the principal items of the claim must be denied. Claimant then appealed to the Secretary of War, who, on January 7, 1921, directed that the decision of the Appeal Section be vacated and further proceedings had in conformity with paragraph 9 of the memorandum of the Vice Chairman, War Department Claims Board. (For prior decisions, see Vol. IV, p. 542, and Vol. VII, p. 155.) (Gas Oil Chemical Co., Case No. 1970, VIII these Dec., 389.)

A decision was rendered in the above claim by the Board of Contract Adjustment on June 30, 1920. On appeal to the Secretary of War, that decision was affirmed substantially as written except as to two items—

- (a) An award of \$2,797.16 for auditor's expenses, made by the Ordnance Claims Board and disallowed by the Board of Contract Adjustment, was reinstated.
- (b) Government's rights to the buildings.—The decision of the Board of Contract Adjustment was to the effect that the United States owned the buildings erected as special facilities and paid for by the United States, though the contract stipulated that only the title to machinery vested in the United States. The Secretary of War held that under the contract, the buildings became the property of the contractor. (For statement of facts and decision of the Board of Contract Adjustment, see Vol. VI, p. 626, decisions of the Board of Contract Adjustment.) (Maritime Manufacturing Co., Case No. 2538, VIII these Dec., 107.)

Upon consideration of the record in this case, including the memorandum dated May 17, 1921, from the office of the Judge Advocate General of the Army, the legal conclusions embodied in which have my approval, I am convinced that the Secretary of War is without authority to adjust or pay these claims. I therefore direct that the decision of the Board of Contract Adjustment, dated June 3, 1920, be set aside, and that the War Department Claims Board proceed no further with the work of the adjustment of these claims. (John

DECISIONS—Continued.**DECISIONS, MODIFIED—Continued.**

W. Weeks, Secretary of War.) (Employees of Minneapolis Steel & Machinery Co., Case No. 2099, VIII these Dec., 66.)

Facts are stated in decision of the Board of Contract Adjustment dated June 30, 1920, reported in Volume VI, page 1036. On appeal the Secretary of War affirmed the decision with the exception of Item No. 5, and returned the record to the Appeal Section with directions to disallow credit by the United States by reason of subleasing of claimant's building. The Appeal Section modified the opinion of the Board of Contract Adjustment in accordance with the directions of the Secretary of War. (A. R. Mosler Co., Case No. 2659, VIII these Dec., 205.)

This claim was disposed of by the Board of Contract Adjustment June 30, 1920, granting relief in part. Upon appeal to the Secretary of War, the decision of the Board of Contract Adjustment was affirmed, with the exception of Item No. 5, and was remanded to the Board for further consideration of this item. (For decision of June 30, 1920, see Vol. VI, p. 1036.) (A. R. Mosler Co., Case No. 2659, VIII these Dec., 25.)

This claim was decided adversely to claimant on February 23, 1921, by the Appeal Section, War Department Claims Board. On appeal to Secretary of War, said decision was vacated. For statement of facts and decision, see Volume IV, page 812; Volume VIII, page 642. (Charles H. Murray, Case No. 1206, VIII these Dec., 774.)

This claim was decided by the Board of Contract Adjustment under date of May 22, 1920, relief being granted, it being the opinion of the Board that the claimant should be paid at the rate of 8½ cents per pound computed upon the maximum weight of the copper as shown by the respective drawings and not upon the actual weight of the bands finally produced. The standing committee of the War Department Claims Board disagreed with the finding of the Board of Contract Adjustment, and from this finding of the War Department Claims Board claimant noted an appeal to the Secretary of War. Under date of October 26, 1920, the Secretary of War reversed the finding of the Board of Contract Adjustment, his decision being that the claimant is only entitled to payment upon the actual weight of the bands delivered. (For statement of facts and decision see these decisions, Vol. V, p. 679.) (Nassau Smelting & Refining Works, Cases Nos. 2670-2672, VIII these Dec., 96.)

This claim was decided May 5, 1920, granting claimant full relief. On reconsideration of the decision at request of special member of War Department Claims Board assigned to Air Service a second hearing was held by Board of Contract Adjustment, and on June 29, 1920, a decision was rendered by that board granting claimant relief in part. On appeal to the Secretary of War both of the above decisions were ordered vacated, and the Appeal Section, War Department Claims Board, directed to enter an order denying claimant relief. (New York & Pa. Railway Co., Case No. 2800, VIII these Dec., 89.)

This claim was decided by the Board of Contract Adjustment and forwarded to the Claims Board, Director of Purchase. Claimant was offered a settlement by the said Board, which it declined, and thereupon appealed to the Appeal Section, War Department Claims Board.

DECISIONS—Continued.**DECISIONS, MODIFIED—Continued.**

Decision forwarded to Purchase Section for further action. (Porter Bros. & Collins, Case No. 2874, VIII these Dec., 264.)

Upon consideration of the appeal and record in the foregoing case, I approve of the recommendations of the vice chairman of the War Department Claims Board in his memorandum of July 29, 1921, with the exception of the item of coal, which I believe should be allowed, and the item of unabsorbed overhead due to delay in receiving plans, which, I believe, should be allowed in the sum of \$73,548.72. Further proceedings will, therefore, be had in accordance with these orders. J. M. Wainwright, Acting Secretary of War. (Reo Motor Car Co., Case No. 3061, VIII these Dec., 862.)

Facts are stated in decision denying relief because of lack of jurisdiction reported in Volume VII, page 90.) On appeal, Secretary of War approves opinion of the Judge Advocate General reversing decision on jurisdiction and returned case for necessary action. Claimant is entitled to be reimbursed for demurrage paid under instructions from Government official on one car of amatol and one car of T. N. T. shipped from Sparta, Wis. (Sabulite Explosives (Ltd.), Case No. 2639, VIII these Dec., 147.)

On June 30, 1920, the Board of Contract Adjustment rendered a decision in the above claims denying relief on a class B claim for material in excess of the quantity necessary to fill orders claimant actually received. That decision failed to mention that 710 pounds of aluminum powder had been delivered to Pain's Fireworks on July 28, 1919, on the order of the New York district ordnance salvage board, to be paid for by the Government at 80 cents per pound. Claimant appealed to the Secretary of War on this item alone. Held, claimant entitled to reimbursement on a quantum meruit and the decision of June 30 to be modified accordingly. (See Vol. VI, p. 682, and Vol. VIII, p. 267.) (Unexcelled Manufacturing Co., Cases Nos. 1908, 1486, and 2165; VIII these Dec., 269.)

This claim was decided by the Board of Contract Adjustment on May 12, 1920, partial relief being granted. Said Board of Contract Adjustment attempted to make an award, which claimant refused to accept, and thereupon noted its appeal to the Secretary of War. The Secretary of War returned the said decision to the Appeal Section, War Department Claims Board, with the direction that the same be forwarded to the Ordnance Section, War Department Claims Board, for further action in accordance with the memorandum thereto attached. (For statement of fact and decision, see Case No. 2146, decided May 12, 1920, Vol. V, p. 332.) (West Steel Castings Co., Case No. 2146, VIII these Dec., 253.)

The Board of Contract Adjustment rendered a decision in this case May 12, 1920, granting relief in part. Claimant appealed to the Secretary of War on the award under the above decision, and case was remanded to Board for further proceedings. (For decision of May 12, 1920, see Vol. V, p. 332.) (West Steel Castings Co., Case No. 2146, VIII these Dec., 47.)

On June 18, 1920, the Board of Contract Adjustment rendered a decision denying relief to claimant. On appeal the Secretary of War directed that the decision of the Board be vacated and that further

DECISIONS—Continued.**DECISIONS, MODIFIED—Continued.**

proceedings be had looking to a settlement contract. (For decision of June 18, 1920, see Vol. VI, p. 380.) (Western Industries Co., Case No. 2490, VIII these Dec., 17.)

On June 18, 1920, the Board of Contract Adjustment rendered a decision in this case denying relief on a formal contract on the ground that the contractor was in default on deliveries. On appeal the Secretary of War ordered the decision set aside and relief granted. (For first decision see Vol. VI, p. 380.) (Western Industries Co., Case No. 2490, VIII these Dec., 193.)

DECISIONS, REVERSED.

See DECISIONS, VACATED and MODIFIED.

DEFAULT, CANCELLATION FOR.**DELIVERY.****DEPRECIATION OF PLANT EQUIPMENT.****DIRECTIONS TO PROCEED WITHOUT WAITING FOR FORMAL CONTRACT.****DISPUTE UNDER CONTRACT EXECUTED IN MANNER PRESCRIBED BY LAW.**

See JURISDICTION.

DOCUMENTS INCORPORATED IN CONTRACT BY REFERENCE.**DURESS.****E.****ENGINEERING AND DEVELOPMENT EXPENSES.**

See COSTS, EXPERIMENTAL.

EVIDENCE.

Where rejected material is stored at a camp site at the request of the contractor the Government assumes no responsibility therefor. The fact that the material can not later be located creates no presumption that it was used by the camp authorities. It may have been stolen or destroyed. The burden is upon the owner to show that the Government used or disposed of the material. (Evens & Howard Fire Brick Co., Case No. 3058, VIII these Dec., 423.)

Where parties make an oral agreement with the Government which is completely performed the subsequent reduction of said agreement to writing in the form of a formal contract is unauthorized and without consideration and will be disregarded by this Board and settlement will be authorized under terms of the oral agreement. (James Shewan & Sons (Inc.), Case No. 3017, VIII these Dec., 436.)

Parol evidence will not be considered where it is sought to vary the plain and unambiguous terms of a written instrument. (Snare & Triest Co., Case No. 3036, VIII these Dec., 455.)

Parol evidence will not be admitted for the purpose of modifying or varying the terms of a written instrument. (Snare & Triest Co., Case No. 3047, VIII these Dec., 463.)

EXCESS MATERIAL.

See BUSINESS RISK.

EXPENDITURES IN ANTICIPATION OF CONTRACT.

EXPENSE.**EXPENSES AFTER NOVEMBER 12, 1918.***See JURISDICTION.***EXPENSE, ALLOWABLE.***See COSTS, LEGITIMATE.***EXPENSES, EXPERIMENTAL.***See COSTS, EXPERIMENTAL.***EXPENSES, EXTRA.***See COSTS, LEGITIMATE.***EXPENSES IN ANTICIPATION OF CONTRACT.****EXPENSES, OVERHEAD.***See COSTS, LEGITIMATE.***EXPENSES, REIMBURSEMENT.****EXPERIMENTAL COSTS.***See COSTS, EXPERIMENTAL.***EXPRESSION OF OPINION.***See CONTRACTS, WHAT CONSTITUTES.***EXTRA EXPENSE.***See EXPENSES, EXTRA.***EXTRA MATERIAL.****EXTRA MATERIAL AS RESULT OF GOVERNMENT REQUIREMENTS.***See CONTRACTS, IMPLIED.***F.****FACILITIES.****FACILITIES, AGREEMENT TO PAY AMORTIZATION ON.***See AMORTIZATION.***FACILITIES, AMORTIZATION.***See AMORTIZATION.***FACILITIES, INCREASED.***See CONTRACTS, CONSTRUCTION; CONTRACTS, WHAT CONSTITUTES.***FACILITIES, SPECIAL.***See CONTRACTS, CONSTRUCTION.***FACILITIES, UNAMORTIZED.***See AMORTIZATION.***FAIR VALUATION.****FORMAL CONTRACT.****FRAUD.***See JURISDICTION.*

Where the evidence establishes that the figures on which a contract is based were furnished by the claimant and afterwards proven to be grossly exorbitant, the effect is the same as if the said estimate was fraudently made, and this Board will refuse to recommend any payment to the claimant. (Burke & James, Case No. 8060, VIII these Dec., 523.)

G.**GENERAL ORDER.****GOVERNMENT.****GOVERNMENT NEEDS, REPRESENTATION.***See CONTRACTS, IMPLIED; CONTRACTS, WHAT CONSTITUTES.*

I.

IMPLIED CONTRACT.

See **CONTRACTS, IMPLIED.**

INCORPORATION OF DOCUMENTS IN CONTRACTS BY REFERENCE.**INCREASED COST OF PRODUCTION.****INCREASED FACILITIES.****INITIAL UNABSORBED OVERHEAD EXPENSES.****INSTRUCTIONS.**

INSTRUCTIONS TO PROCEED WITHOUT WAITING FOR FORMAL CONTRACT.

INTEREST.

In the absence of statutory provisions or the terms of a specific contract no interest accrues on claims against the Government. Therefore, where the contractor has made disbursements for machine tools under the circumstances outlined in paragraph 1, and reimbursement has been refused under a misconstruction of the contract, no interest can be allowed on the sum of money in controversy. (Reo Motor Car Co., Case No. 3061, VIII these Dec., 823.)

Where a contractor with the Government seeks reimbursement for interest on money borrowed during a Government contract, it is essential to claimant's right of recovery that it be conclusively shown that the money was actually borrowed during said contract and applied to the specific purpose covered by its provisions. Claimant's inability to establish this fact is fatal to recovery. (Reo Motor Car Co., Case No. 3061, VIII these Dec., 823.)

In the absence of conclusive proof that borrowed money was used to purchase material applicable to the Government contract a claim for interest on such borrowed money will be disallowed. (Van Dorn Iron Works, Case No. 3028, VIII these Dec., 284.)

J.

JURISDICTION.

The Secretary of War has no jurisdiction to adjust a claim for unliquidated damages based on an alleged breach of a formal contract by the United States. Held, claimant entitled to no relief on the merits, and for lack of jurisdiction. (Wm. J. Cocke, Case No. 3020, VIII these Dec., 101.)

Where a proxy-signed contract is later supplemented and amended by a formally executed supplement which is, in turn, again amended by a formally executed supplement, the said informal contract becomes merged in the subsequent formal supplements and the resultant contract is a formal contract, so that when the same has been completed by performance and payment, the Secretary of War has lost any jurisdiction to adjust or settle any disputes arising under the same. (American Can Co., Case No. 2919, VIII these Dec., 567.)

A settlement agreement entered into subsequent to November 11, 1918, and not complying with the formalities required by section 3744, R. S., is not a binding obligation upon the United States. (American Propeller & Manufacturing Co., Case No. 3054, VIII these Dec., 743.)

Where the representatives of the President purchase certain steamships for the United States which are turned over to the United States Shipping Board for operation, and the Shipping Board at some time during its possession turns over four of the ships to the War De-

JURISDICTION—Continued.

partment on "Time form charters," such transaction does not constitute a purchase by the President of the ships for War Department purposes within the meaning of the act of March 2, 1919. (George A. Carden and Anderson T. Herd, Case No. 2664, VIII these Dec., 294.)

The Appeal Section, War Department Claims Board, as the agency of the Secretary of War, is without jurisdiction to entertain a claim growing out of the purchase of any property made by the President of the United States, or by his duly authorized and constituted agents, unless it shall be made to appear that such purchase was made for War Department purposes. (George A. Carden and Anderson T. Herd, Case No. 2664, VIII these Dec., 294.)

The Secretary of War has authority to enter into a supplemental agreement and pay a lump sum in settlement of unliquidated items arising from part performance of a contract after the contractor has been notified that the Government must cancel the contract. (Compac Tent Co., Case No. 3018, VIII these Dec., 258.)

Where claimant enters into negotiations with constructing quartermaster for the supplying of certain sand and gravel, and afterwards submits to a cost-plus contractor having the construction in charge, a formal bid for supplying the same materials in the same quantity as referred to in the negotiations between the constructing quartermaster and the claimant, which said bid or proposal is accepted by the prime contractor, no agreement thereby results from the negotiations of the claimant with the constructing quartermaster that the Secretary of War is authorized to adjust or settle under the provisions of the act of March 2, 1919. (Fitzgerald Construction Co., Case No. 3043, VIII these Dec., 349.)

When the Government becomes obligated for storage and insurance after a reasonable length of time and when the reasonable length of time does not bring about that obligation prior to November 12, 1918, such obligation to pay does not come within the purview of the act of March 2, 1919, it is not within the jurisdiction of the Appeals Section to determine whether such an obligation arose after November 12, 1918. (A. C. Lawrence Leather Co., Case No. 1933, VIII these Dec., 142.)

The Secretary of War is without authority to adjust an informal agreement entered into after November 11, 1918. (Louisiana Railway & Navigation Co., Case No. 2859, VIII these Dec., 166.)

The Secretary of War has no jurisdiction to adjust a claim based upon an informal agreement when no expenditures have been made or obligations incurred upon the faith of same. (J. E. Lyons, Case No. 3015, VIII these Dec., 540.)

Where it appears from all of the evidence, as well as supporting affidavits and documents, that the claimant has either innocently or maliciously sought to take advantage of the United States in the presentation and proof of his claim, the Secretary of War will deny jurisdiction and refuse to make the settlement prayed for. (Charles H. Murray, Case No. 1206, VIII these Dec., 642.)

Where claimant files with an agency of the Secretary of War two affidavits in which are set out by items his expenditures incurred in a journey made at the instance of the Secretary of War, and the items contained in the two affidavits are so inconsistent as to the

JURISDICTION—Continued.

amounts of such expenditures as to raise the question of the good faith of the claimant, the Secretary of War should refuse to assume jurisdiction of the claim for the purpose of deciding it upon its merits. (Charles H. Murray, Case No. 1206, VIII these Dec., 642.) Where the evidence adduced by claimant upon a hearing is of such a contradictory and inconsistent nature as would raise the suspicion of fraudulent intent the Secretary of War will refuse to take jurisdiction and deny the claim. (Charles H. Murray, Case No. 1206, VIII these Dec., 642.)

Whenever a claim is presented to the Secretary of War for adjustment and the evidence shows that the same is tainted with fraud, or a suspicion of fraud, the Secretary of War is entirely within his rights in refusing to take jurisdiction of the same for the purpose of deciding it upon its merits. (Newark Rubber Co., Case No. 3059, VIII these Dec., 589.)

Where a procurement order was issued prior to November 11, 1918, for increased facilities and further negotiations were had after November 11, 1918, the agreement entered into prior to the armistice is the basis for an adjustment of the claim under the act of March 2, 1919. (New England Westinghouse Co., Case No. 3011, VIII these Dec., 695.)

The Secretary of War is without authority under the act of March 2, 1919, to adjust an informal agreement entered into after November 11, 1918. (New England Westinghouse Co., Case No. 3011, VIII these Dec., 695.)

The Secretary of War has no authority under the act of March 2, 1919, to pay for facilities purchased prior to the date of the informal contract. (Rollin Chemical Co., Case No. 2911, VIII these Dec., 129.)

Where a formally executed contract is terminated by a full performance the Secretary of War is without jurisdiction to entertain or to adjust a claim arising thereunder except where such claim arises by reason of "doubts and disputes as to the meaning of the terms contained in the contract." (Snare & Triest, Case No. 3036, VIII these Dec., 455.)

This Board has no jurisdiction over a claim for damages, whether liquidated or unliquidated, based on a terminated formal contract. (United States Aircraft Corporation, Case No. 1234, VIII these Dec., 426.)

The power of the Secretary of War to settle formal contracts by agreement with the contractor can not be exercised where the contract has been fully executed by performance by the contractor or terminated by breach and by expiration of time for performance. (United States Aircraft Corporation, Case No. 1234, VIII these Dec., 426.)

An oral agreement for the suspension of a contract for the manufacture of chemicals entered into prior to the armistice in order that the Government might obtain the chemicals at a less price from other sources is not an agreement within the purview of the act of March 2, 1919, as it is not for a purpose connected with the prosecution of the war. (United States Industrial Chemical Co., Case No. 8042, VIII these Dec., 795.)

JURISDICTION—Continued.

The Secretary of War is without jurisdiction to grant relief where a formal contract has been terminated by the United States by cancellation. (West Coast Shipbuilding Co., Case No. 2296, VIII these Dec., 470.)

The Secretary of War will not assume jurisdiction to make adjustment of a claim arising under formally executed cost-plus contracts completed by full performance, no doubts or disputes arising as to the meaning of anything in the contracts and no special or unusual reason appearing which would require assuming jurisdiction by the Secretary of War. (Winchester Repeating Arms Co., Case No. 3037, VIII these Dec., 385.)

In order for the Appeal Section, War Department Claims Board, to assume jurisdiction of a claim of a subcontractor it must affirmatively appear that the claim was filed by the prime contractor originally or by the subcontractor through the prime contractor. (Wisconsin Motor Manufacturing Co., Case No. 2988, VIII these Dec., 365.)

It must satisfactorily appear that the claim was presented to a Government agency within the time prescribed by the act of March 2, 1919, in order to cover jurisdiction upon the Secretary of War. (Wisconsin Motor Manufacturing Co., Case No. 2988, VIII these Dec., 365.)

LABOR.

LABOR AND MATERIALS USED IN REPAIR.

LABOR DISPUTES.

LACK OF CONSIDERATION IN CONTRACTS.

See **CONTRACTS, WHAT CONSTITUTES.**

LATE DELIVERIES.

See **WAIVER.**

LIQUIDATED DAMAGES.

See **JURISDICTION.**

LOSS NOT SUSTAINED.

Where claimant has a contract for the coloring and waterproofing of airplane hangars, which is suspended before claimant begins work in dyeing or waterproofing the said hangars, and said claimant is unable to point out to the Government any expenditures made under the same, it is thereby precluded from recovering on account of the said suspension or termination of the contract. (Baker & Lockwood Manufacturing Co., Case No. 3022, VIII these Dec., 195.)

M.**MATERIAL.**

MATERIALS PURCHASED IN ANTICIPATION OF ORDERS.

MEASURE OF ADJUSTMENT.

See **CONTRACTS, ADJUSTMENT.**

MEETING OF MINDS.

See **CONTRACTS, WHAT CONSTITUTES.**

MERGER.

MERGER OF NEGOTIATIONS INTO WRITTEN CONTRACT.

METHOD OF ADJUSTMENT.

See **CONTRACTS, ADJUSTMENT.**

MISTAKE.

See **CONTRACTS, REFORMATION.**

MUTUAL MISTAKE.

See **CONTRACTS, REFORMATION.**

N.**NEGOTIATIONS.**

NEGOTIATIONS MERGED INTO WRITTEN CONTRACT.

NEGOTIATIONS ONLY.

See **CONTRACTS, IMPLIED.**

ORAL ORDER.

See **CONTRACTS, ORAL.**

ORDER, ADDITIONAL.**ORDERS, ANTICIPATED.****OVERHEAD EXPENSE.****OVERRUN BEYOND CONTRACT ALLOWANCE.****P.****PART PERFORMANCE.****PASSING OF TITLE.****PERFORMANCE, SUBSTANTIAL.****PLANT EQUIPMENT.**

PLANT EQUIPMENT, DEPRECIATION.

PLANT AND EQUIPMENT, "SPECIALLY PROVIDED."

PREPARATION.

PREPARATION FOR AN ANTICIPATED CONTRACT.

PREPARATION TO PERFORM CONTRACT.

PRESENTATION OF CLAIM.

See **JURISDICTION.**

PROCEDURE.

See **CONTRACTS, ADJUSTMENT.**

Where an appeal to the Secretary of War the Secretary directs the Appeal Section to take further proceedings to determine whether a course of dealing between claimant and the Government had ripened into a custom, this Board will follow the directions of the Secretary of War, and, if the custom is established, will render a decision in accordance therewith. (Alcohol Products Co., Case No. 194, VIII these Dec., 114.)

Where claimant includes an item for plant depreciation in its claim and suggests to the bureau board and also to the Board of Contract Adjustment or this Board as alternative relief an allowance for use and occupation the Appeal Section will consider the matter as if the alternative had been formally asked for. (Anniston Steel Co., Case No. 2248, VIII these Dec., 368.)

Where this Board has heretofore rendered a decision directing that an award be made under the provisions of Supply Circular 111 and the Purchase Section omits to include in its award certain items properly allowable under the supply circular, the record will be returned to the Purchase Section with directions to make such allowances, although the amount thereof may be small. (Buffalo Shirt Co., Case No. 3023, VIII these Dec., 98.)

Where it is probable from a review of the record that claimant might be able to show that it was entitled to an additional award for items of excessive cost of articles delivered under a suspended contract, but the evidence contained in the record is not such as to enable this Board or the Purchase Section to segregate from the cost of

PROCEDURE—Continued.

manufacture items of excessive cost due to items for which the Government is not liable, claimant will be given an opportunity to file an amended statement and also will be given opportunity to present to the Purchase Section evidence in support thereof, and the record will be returned to the Purchase Section for appropriate action. (Buffalo Shirt Co., Case No. 3023, VIII these Dec., 98.)

Where a subcontractor for the manufacture of walnut gunstocks enters into agreements with producers of walnut logs and after the contract of the prime contractor is suspended on account of the armistice, the Ordnance Claims Board, in order to expedite the adjustment of the gunstock contracts, enters into cancellation agreements with the walnut-log producers with the understanding that the amount agreed upon in settlement will be paid in cash, and afterwards the Ordnance officers and agents engaged in effecting settlement of the gunstock contracts by oversight omit to include the claims of the walnut-log producers in the claim of the subcontractor and a final statutory award is made the prime contractor, the mistake of the Ordnance officers, who are acting both for the Government and for the producers, is a mutual one, and because of such mistake the final statutory award should be reopened and a supplemental award made for the amount due the various producers. (W. D. Ham, Case No. 3027, VIII these Dec., 243.)

Even if the mistake of the Ordnance officers and agents in omitting the producers' claim from the final statutory award be not considered as a mutual mistake, yet under the circumstances of this case, where the producers were depending upon the Ordnance officers to do all things necessary to secure payment of the amount agreed upon as damages arising from the cancellation of their contracts, the final statutory award made to the prime contractor should be reopened and a supplemental award made for the various amounts due the producers. Such supplemental award is necessary to complete the adjustment of the prime contract and to make it a just and equitable settlement within the meaning of the Dent Act. (W. D. Ham, Case No. 3027, VIII these Dec., 243.)

Where an entire transaction for the manufacture of chassis involves separate orders and changes in specifications, and the claim is presented based on the entire transaction in which are both formal and informal agreements, and a certificate "C" has been issued by the Ordnance Section and an item award made, the claim will be transmitted to the Auditor for the War Department, although the particular item involved in the appeal arises out of a formal contract and formal amendments, and the Appeal Section will not undertake to determine the question of jurisdiction. (Kissel Motor Car Co., Case No. 3002, VIII these Dec., 301.)

Where, under the circumstances stated in paragraph 1, a claim is to be transmitted to the Auditor for the War Department and the contract out of which the dispute arises provides that the Secretary of War shall be the final arbiter of disputes under the contract, the Appeal Section, acting for the Secretary of War, will determine the dispute before transmitting the claim to the auditor. (Kissel Motor Car Co., Case No. 3002, VIII these Dec., 301.)

PROCEDURE—Continued.

This Board or any other claims board has no authority to demand that claimant shall, as a condition precedent to any offer of settlement or award, submit releases from all its subcontractors. The provisions of the Dent bill only require that before the payment of the award shall such releases be submitted. (For statement of fact, see Case No. 2358, Vol. V, p. 451.) (Porter Bros. & Collins, Case No. 2874, VIII these Dec., 264.)

A settlement agreement providing for the termination of a contract for the manufacture of chemicals, though signed by the contractor and a representative of the Government, does not give the contractor any vested rights until finally approved by a bureau board, where the settlement contract provides that it shall have no binding effect until approved by the bureau board. Under such circumstances the suspended contract should be adjusted under the supply circulars. (U. S. Industrial Chemical Co., Case No. 3042, VIII these Dec., 795.)

PRODUCTION; STIMULATION.**PROFITS, PROSPECTIVE.****PROMISE.**

PROMISE OF CONTRACT.

PROSPECTIVE PROFITS.**PROXY-SIGNED CONTRACTS.****Q.****QUANTUM MERUIT.****QUANTUM VALEBAT.****R.****RECOMMENDATION.**

RECOMMENDATION DOES NOT CONSTITUTE A CONTRACT.

See CONTRACTS, WHAT CONSTITUTES.

RECOMMENDATION OF CONTRACT.

RECOVERY FOR REJECTED ARTICLES IN EXISTENCE.**REFORMATION OF CONTRACTS.**

See CONTRACTS, REFORMATION.

REIMBURSEMENT.

See COSTS, EXPERIMENTAL; JURISDICTION; LOSS NOT SUSTAINED.

RELEASE.**REPAIRS.****REPRESENTATION.**

REPRESENTATION OF GOVERNMENT NEEDS.

See CONTRACTS, IMPLIED.

REPRESENTATION REGARDING FURTHER ORDERS.

RIGHTS.

RIGHTS OF PARTIES.

See CONTRACTS, CONSTRUCTION.

S.**SALARIES.****SECRETARY OF WAR, JURISDICTION.**

See JURISDICTION.

SETTLEMENT CONTRACTS.

SPECIAL FACILITIES.

See **CONTRACTS, CONSTRUCTION.**

SPECIFICATIONS.**STIMULATION OF PRODUCTION.****SUBCONTRACTORS.**

Where the original contract contains a termination clause and a sub-contract refers to and adopts the prime contract, the subcontractor is entitled to an adjustment of his claim under and in accordance with the provisions of the prime contract in case of suspension by the United States of the work under the prime contract. (Harry F. Hann, in behalf of Walker Electric & Plumbing Co., Case No. 3053, VIII these Dec., 648.)

SUSPENSION.

SUSPENSION AND REIMBURSEMENT OF CONTRACT.

SUSPENSION OR CANCELLATION.

T.**TERMINATION.**

TERMINATED PROXY-SIGNED CONTRACT.

TERMINATION CLAUSE, CONSTRUCTION.

See **CONTRACTS, CONSTRUCTION.**

TERMINATION OF CONTRACT.

TIME LIMIT FOR FILING CLAIMS.

See **JURISDICTION.**

TITLE PASSING.**TORTS.****U.****UNABSORBED OVERHEAD EXPENSES.****UNAMORTIZED FACILITIES.**

See **AMORTIZATION.**

UNLIQUIDATED DAMAGES.**V.****VAGUE AGREEMENT.**

See **CONTRACTS, WHAT CONSTITUTES.**

W.**WAIVER.**

The duty in the first instance devolving upon claimant to furnish a bond, the fact that performance of a contract involving expenditures and liabilities was commenced without giving the bond and with the knowledge of the United States does not constitute a waiver of the right of the Government thereafter to insist upon the bond being given and to cancel the contract for failure or refusal to do so. (West Coast Shipbuilding Co., Case No. 2296, VIII these Dec., 470.)

WAGES, BELOW STANDARD.**WORK, ADDITIONAL.**

See **CONTRACTS, IMPLIED.**

WRITTEN CONTRACT.

See **CONTRACTS, WRITTEN.**

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